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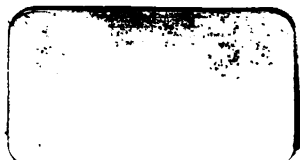
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Consistory Court.*

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JUDGMENTS

DELIVERED IN THE
CONSISTORY COURTS OF LONDON, HEREFORD,
RIPON AND WAKEFIELD,
AND IN THE
COMMISSARY COURT OF CANTERBURY,

1872 TO 1890.

BY
CHANCELLOR TRISTRAM, Q.C., D.C.L.

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P R E F A C E.

SEVERAL of the Judgments contained in the present Volume have already appeared in the Law Reports, and some of the later ones also in the Times Law Reports; and accurate reports of all of them, furnished by a member of the Bar, Mr. W. J. Soulsby, are to be found in the Law Reports in the *Times*.

It has of late years been frequently suggested to me, that it would be a convenience to those who may practise in the Ecclesiastical Courts, or who are interested in the administration of Ecclesiastical Law, that the Judgments which I have delivered since I was appointed Chancellor of London in 1872, should be collected and published in one Volume.

I have followed up this suggestion by the publication, in the present Volume, of the principal Consistory Judgments which I delivered from 1872 to 1890. Those based on decisions previously reported, or on the determination of mere issues of fact; also those delivered (with one exception) during the last two years, are not included in this Volume. The latter have been, or will be, reported in the Law Reports.

On certain questions, in respect of which a judicial discretion is vested in the Court, some of my decisions are a departure from the practice of the Court in former days; but whenever they are so, I venture to think the departure will be found to have been fully justified by the change of times and circumstances.

I have inserted, in the Supplement, the General Rules and Regulations to be observed in Suits and Proceedings in the Consistory Court of London. These I have introduced in and since 1877 in virtue of powers conferred on the Judge of the Consistory Court by 10 Geo. IV. c. 53, s. 9. Previously to the passing of this Statute, it had been the custom for the Judges of the Ecclesiastical Courts held in Doctors' Commons, to make Orders of Court from time to time for regulating and amending the practice of their Courts; and in 1830 this power, which rested on custom, became by this section a statutable one.

The Judges of other Diocesan Courts are considered to have an inherent power vested in them to amend the practice of their Courts by Orders, confirmed by the Bishop of the Diocese; and those in the Province of Canterbury are also entitled to adopt the practice of the Consistory Court of London, wholly or in part, when they deem it advisable so to do.

The importance of making New Rules of Pleading and Practice in the Courts in which I presided, was publicly pressed on my attention by the late Right Honorable Alexander J. B. Beresford-Hope, M.P., at a Churchwarden's Visitation Court, held on the occasion of an Archiepiscopal Visitation of the Diocese of Canterbury. Mr. Beresford-Hope then, speaking for himself and the other churchwardens, said that it was the wish of the laity, as far as he could ascertain, that they should have easier access to the Diocesan Courts in matters within their jurisdiction, especially where there were differences of opinion in a parish in reference to proposed alterations in the parish church; that by the then existing system of pleading they were debarred from having such access without legal assistance, and being involved in considerable expense, even on trivial matters; and he suggested that the procedure should be so amended as to enable them to appear as Respondents in Faculty Cases in person, and without being required to file pleadings.

I felt the force of Mr. Beresford-Hope's suggestions, and after the Judicature Rules had been settled and in force, I prepared, with the entire concurrence of the late Bishop of London, a new set of Rules of Pleadings and Practice for the Court (adopting such of the Judicature Rules as were applicable to cases coming before the Court), and established them in the manner required

by the Statute. I have subsequently made some additional Rules to meet cases not provided for by the Rules of 1877.

By the present practice any party interested in a Faculty Case is entitled to be heard in opposition to it, without being required to file a pleading, or even to enter an appearance before the case comes on for hearing. Thus far this new practice has given very general satisfaction, and has been unattended with inconvenience.

Any possible inconvenience that may arise, from the Petitioners being taken by surprise owing to the Objector not having filed a pleading, may be obviated by allowing an adjournment of the case to give them an opportunity of procuring evidence to meet the case put forward by the Respondent; or, in the event of an appeal, by allowing, before the termination of the case, such a pleading to be filed as will give the Appellate Court notice of the question in issue.

These Rules are also the Rules of Practice in the Consistory Courts of Hereford, Ripon, and Wakefield, and in the Commissary Court of Canterbury.

THOMAS HUTCHINSON TRISTRAM.

12, KING'S BENCH WALK, TEMPLE,
January 24, 1893.

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CASES

DETERMINED

In the Consistory Courts of London, Hereford, Ripon,
and Wakefield, and
In the Commissary Court of Canterbury.

ERRATA.

Page 50, line 6—After "*Qualification*," insert "*to vote*."

„ 50, line 7—After "*qualification*," insert "*to vote*."

„ 308, line 23—After "*CHURCHWARDEN, qualification*," insert "*to vote*."

for a faculty to authorize the erection, in the church of St. Dunstons, of a Baldacchino, being a handsome marble structure or canopy standing apart from the east wall of the chancel, with a pointed roof and three gables pointing different ways, supported by four columns extending two or more feet beyond the Holy Table, and described as a small house in which the altar was to stand.

(1) *Held*, That the Ciborium, or Altar Canopy, known and used in England prior to the Reformation, was an ornament or article of church furniture within the meaning of that term as used in the First Prayer Book of Edward VI., having all the characteristics of a church ornament as regards its form, the materials of which it was constructed (silk), its symbolical significations, and the uses to which it was applied.

(2) That the proposed erection is not an architectural adornment for

(a) Reported L. R. 4 Adm. & Ecol. 207.

T.

B

1873.
December 15.

THE VICAR
AND CHURCH-
WARDENS OF
THE PARISH OF
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the east end of the church, as if the Holy Table were moved from underneath it, it would be there without meaning. That it must, therefore, be an erection in connection with the Holy Table, and if so, must be either a structure so attached to it as to form part of it, or a structure separate from but in connection with it. If the former, it is the Table with the Baldacchino added to it, instead of the decent Communion Table required by the 82nd Canon. If the latter, it is a Church Ornament.

(3) That there is no distinction between the Pre-Reformation Altar Canopies and the Baldacchino proposed to be erected to take it out of the category of Church Ornaments.

(4) That as a Church Ornament, it being neither sanctioned by the First Prayer Book of Edward VI., nor by the Rubrics, and not being subsidiary to the performance of the services of the Church, the duty of the Court was to decline to authorize its erection by Faculty.

The Court dismissed the Petition with costs.

August 4.

W. G. F. Phillimore moved for a Faculty to authorize the erection of a Baldacchino in the Chancel of St. Barnabas, Pimlico. He submitted that there was nothing illegal in the structure, and that there was no reference to it in the Injunctions of Edward VI., or in the Advertisements. There was no opposition on the part of the parishioners to the application.

Dr. TRISTRAM.—This is a novel application. For its due consideration the Court will expect to be furnished with an affidavit from Mr. Street as to the nature of the particular structure, and as to how far the roof will project over the Holy Table, with specifications. The application must stand over for further information and consideration.

August 11.

An appearance was entered, by leave of the Court, for William Bowron, a resident parishioner, in opposition to

the granting of the Faculty, who subsequently filed an answer to the petition for the Faculty, to which the petitioners filed a reply.

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December 15.
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WARDENS OF
THE PARISH OF
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BOWRON.
Oct. 23, 24.

The case was heard on the pleadings and affidavits.

W. G. F. Phillimore argued the case for the Vicar and Churchwardens in support of the Faculty prayed.

A. J. Stephens, Q.C., on behalf of Mr. Bowron, argued against the granting of the Faculty.

The facts bearing on the case are fully given in the judgment.

Cur. adv. vult.

Dr. TRISTRAM.—This is an application to the Court by the Rev. G. C. White, vicar, and the Churchwardens of the Parish of St. Barnabas, Pimlico, to issue a Faculty authorizing the erection of a Baldacchino over the Communion Table of the church of that parish. December 15.

The petition for a Faculty was filed in the month of June, 1873, and the petitioners had, in accordance with a practice not unusual in this diocese, previously submitted the plan for the Baldacchino to the Bishop of London, and his Lordship, by an indorsement on it, directed the attention of the Court to the peculiar character of the proposed erection.

The practice in this diocese of submitting plans for proposed alterations in or additions to a church to the Bishop before applying for a Faculty is of convenience to the applicants, as it affords them an opportunity of obtaining the advice or suggestions of the Bishop in

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December 15.

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respect to the plan, and is of assistance to the Chancellor, whose attention is directed by the Bishop to any parts of the plan which may appear to his Lordship deserving of special consideration.

The jurisdiction to grant or withhold Faculties is, however, vested in the Chancellor, who is bound to exercise such jurisdiction in accordance with the law and practice of the Court, and from his decision there is an appeal to the Court of the Province, with an ultimate appeal to her Majesty in Council.

Upon the petition being presented for the Faculty in this case, the Court directed a citation to issue, but with an intimation that in consequence of the unusual character of the application it would require the Faculty to be moved for by counsel in Court.

Service of the citation having been effected, but no appearance having been entered to it, Mr. Phillimore, on the 4th day of August, as counsel for the Vicar and Churchwardens, moved for an order for the Faculty to issue, and stated the grounds upon which he considered it was within the jurisdiction of the Court to grant the application, and I then reserved my decision.

A few days afterwards, on the 11th day of August, Mr. Bowron, an inhabitant of the parish and a member of the Church of England, applied for leave to enter an appearance, to enable him to oppose the grant of the Faculty on behalf of himself and other parishioners. I allowed his application, and he appeared, first in person and afterwards by proctor; and an act on petition was brought in by his proctors, in which his opposition to the granting of the Faculty was based substantially on two grounds, namely:—1st, that the erection of a Baldachino over the Holy Table was unlawful; and 2ndly, that

if lawful, its erection, being opposed to the religious feelings and convictions, as he alleged, of a large number of the parishioners, the Court, in the exercise of its discretion, ought to refuse the Faculty. These averments were traversed by the petitioners, and affidavits were filed in support of the cases set up by the contending parties. On the 23rd and 24th of October, the questions raised by the pleadings were argued by Mr. Phillimore on behalf of the petitioners, and by Dr. Stephens on behalf of Mr. Bowron; and I have to thank both the learned counsel for the assistance they have rendered to the Court by their able and learned arguments.

The proposed Baldacchino is a handsome marble structure or canopy, with a pointed roof and three gables pointing different ways, supported by four columns standing apart from the east wall of the church, and would cover the Holy Table, extending about two feet beyond the west side of the Holy Table, leaving sufficient space for the celebrant priests to stand within the canopy on the north and south sides of the Table.

During the argument numerous authorities were cited by the counsel on both sides in reference to the date of the introduction into the Eastern and Western Churches of altar canopies; the different terms by which they were designated; their form, and the materials of which they were constructed; their symbolical signification; and their use.

As the history of altar canopies is not without a bearing on the first and main question under the consideration of the Court, I will state briefly what appears to me to be the fair results of the historical information before the Court on these several heads.

The earliest known instance of an altar canopy in the

1873.
December 5.

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THE PARISH OF
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1873.
December 15.

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AND CHURCH-
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Christian Church appears to have been one in the Church of St. George, at Thessalonica (referred to by Mr. Phillimore), and supposed to have been in use about A.D. 325, and from the representation of it extant, it would seem to have been a canopy fashioned like a cupola or cup reversed, resting on four columns planted at the four corners of the altar, and between the columns were curtains, and there were steps leading up to the altar. Texier, 1 Pullan, p. 134, plate 33.

This dome-like canopy amongst the Greeks was usually designated *κιβώριον*—Ciborium—from its resemblance to the bowl of a reversed cup. Bingham's *Antiquities of the Christian Church*, Book VIII. c. 6, s. 18. See also Rock's *Hierurgia*, p. 505. Altar canopies were subsequently introduced into Italy, and were placed over the High Altar—as well as into France and other countries in Western Europe. On the schism between the Eastern and Western Churches the use of the canopy of the Ciborium in France was discontinued, but that of side curtains was retained: *Dictionnaire Raisonné de l'Architecture Française*, par M. Viollet-Le-Duc, vol. 2, p. 32. In later times, in Italy, the term Ciborium was transferred to a tabernacle or diminutive temple erected on the altar, in which was placed a Pyx containing the reserved Sacrament; and the ancient canopy is said to have been thenceforward called *Umbraculum* or *Baldacchino*, so called from *Baldach* an old name of Babylon, from whence came the stuff or silken material of which such canopies were then principally composed.

In England, the introduction into general use of altar canopies is referred to. A Constitution of Archbishop Peckham, A.D. 1279, requiring a tabernacle to be made in every church in future with a decent inclosure, within

which the reserved Sacrament was to be placed in a Pyx. 2 Johnson's Canons, p. 464.

From the interior of this canopy was suspended, by a chain over the High Altar, a Pyx or other vessel in the shape of a turret or a dove containing the reserved Sacrament. The words of the Constitution, as given in Lyndwood, are as follows :—" Dignissimum Eucharistiæ Sacramentum præcipimus de cætero taliter custodiri, ut in quâlibet Ecclesiâ Parochiali fiat Tabernaculum, cum clausurâ, decens et honestum, secundum curæ magnitudinem et Ecclesiæ facultates, in quo ipsum Dominicum corpus non in bursâ vel loculo propter comminutionis periculum nullatenus collocetur, sed in Pyxide pulcherrimâ, lino candissimo interius adornata; ita quod sine omni diminutionis periculo facile possit extrahi et imponi."—Lyndwood's Provinciale, lib. 3, tit. 26, p. 248.

It was suggested by the counsel for the petitioners, that the erection enjoined by this Constitution was that of a small inclosed tabernacle, or diminutive temple, such as was in later times introduced into Italy, and frequently placed on the side altars for the reception of the reserved Sacrament, and was not the altar canopy. But the Commentary of Lyndwood (A.D 1422), on Archbishop Peckham's Constitution, in reference to the words "*Tabernaculum*" and "*Clausura*," is inconsistent with this suggestion. For he there speaks of the Pyx at that time as suspended over the altar in an open place, that it might be more readily presented to the view of the people to receive their adoration.

In his Commentary on the word "*Tabernaculum*," he says—" Sic dictum, quia de Tabulis sit factum, vel quia Tabulis vel lignis sit appensum." And on the words "*Cum Clausura*" (referring to a passage in the Extrava-

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gantes), “ubi dicitur, quod in loco singulari, mundo, et signato, debet servari Eucharistia. Et ex hoc videtur, quod usus observatus in Angliâ ut scilicet, in Conopeo pendeat super Altare, non est commendabilis, quia contra mentem dicti—c. sane—ubi v. statuitur, quod non custodiatur in loco patenti sed singulari. Licet enim Consuetudo Anglicana commendabilis sit illâ consideratione, quâ citius repræsentatur nostris aspectibus adoranda.”—
Lib. 3, tit. 26.

The accuracy of this comment of Lyndwood’s, as to what was the practice in England, receives confirmation from the representations of a canopy on one of the Peterborough Seals (3 Rock’s Church of our Fathers, p. 294), and of the canopy over the High Altar in the Cathedral of Durham, which is thus described:—

“Within the said Quire over the High Altar did hang a rich and most sumptuous Canopie, for the Blessed Sacrament to hang within it, which had two irons fastened in the French peere, very finely gilt, which held the Canopie over the midst of the said High Altar, (that the Pix did hang in it, that it could not move nor stir),” &c., &c.: see *Ancient Monuments, Rites, &c.*, of Durham, Surtees Society, 1842, and 3 Rock’s Church of our Fathers, pp. 206-7, which contains a representation of this canopy.

Again, one of the demands of the Devonshire rebels in Edward VI.’s time (A.D. 1549) was—“We will have the Sacrament hang over the High Altar, and there to be worshipped, as it was wont to be.” *Strype’s Life of Cranmer*, App. XL., p. 97.

Again, Dr. Harding, in his celebrated controversy with Bishop Jewel (A.D. 1564), in the Ninth Article of the Controversy, which is headed, “Of the Reverent

Hanging Up of the Sacrament under a Canopy," says—
 "If Master Jewel would in plain terms deny the reservation and keeping of the Blessed Sacrament, for which purpose the Pix and Canopy served in the Churches of England, as of the professors of this new Gospel it is both in word and also in deed denied." (The Works of Jewel, 2nd portion, Parker Society Ed., p. 553.) Again, Dr. Harding says—"Whereto we say that if he, and the rest of the Sacramentaries, would agree to the keeping of the Sacrament, then would we demand why that manner of keeping were not to be liked. . . . In other Christian countries we grant it is kept otherwise, under lock and key; in some places at one end or side of the altar, in some places in a chapel built for that purpose, in some places in the vestry, or in some inward and secret room of the church, as it was at the time of Chrysostom at Constantinople. . . . Thus in divers places diversely hath it been kept, everywhere reverently and surely, so as it might be safe from injury and villainy of miscreants and despisers of it. The hanging up of it on high hath been the manner of England, as Lindwood noteth upon the Constitutions Provincial—on high, that wicked despite might not reach it; under a canopy for shew of reverence and honour." *Ib.*, 555.

The above citations show that the altar canopies introduced into England under Archbishop Peckham's Constitution, and in general use here prior to and at the time of the Reformation, were over the High Altar; and in 3 Rock's Church of our Fathers, p. 208, it is stated, "that the first wooden or stone tabernacle" (and it was of such materials that the small tabernacles were at this time made) resting on the altar seen in this land, was put up in Queen Mary's reign. Altar canopies in Eng-

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land appear, prior to the Reformation, to have been principally composed of some stuff or silken material, as also in Italy until the 17th century. The altar canopy over the High Altar under the dome of the cathedral church of St. Peter's in Rome, is said to have been the first Baldacchino constructed in Western Europe of durable material. It is described by Viollet-Le-Duc, vol. 4, p. 508, *Dictionnaire Raisonné de l'Architecture Française*. See also *Dictionnaire Historique D'Architecture*, by M. De Quincy, vol. 1, p. 149, on the word "*Baldaqin*;" Rock's *Hierurgia*, p. 506.

It may be here observed, that by ancient custom canopies or Baldacchinos are, in some countries, carried over personages of dignity on state occasions as a mark of respect or honour. Thus a canopy is borne over the Sovereign of this country during a part of the ceremony of the coronation. For the like purpose a Baldacchino is carried over the Pope, over cardinals, and over Roman Catholic bishops in processions. In the *Rituale Romanum*, p. 34, ed. 1834, it was ordered, that a Baldacchino should be carried over the Host when conveyed to sick persons; and on the Feast of Corpus Christi, instituted A.D. 1264 by Pope Urban the IVth (*Ceremoniale Episcoporum*, 377), for the special adoration of the Consecrated Wafer, a Baldacchino was ordered to be prepared to be carried over the Sacrament.

Baldacchinos are therefore, with significancy and with consistency, erected over the altars of Roman Catholic churches, "for honour" (as Dr. Harding, in his *Controversy with Bishop Jewel*, says) "*of that blessed Sacrament.*" (Jewel's Works, p. 557.)

So much for the historical view of the case.

I will now proceed to consider it in its legal aspect;

and the first question that suggests itself to the judgment of the Court on this branch of the case is, whether the Baldacchino or altar canopy, proposed to be erected in St. Barnabas' (which was described by the counsel for the petitioners "as an extremely rich ornament covering the whole of the altar; and, in fact, a small house, under which the altar stood"), is an ornament in the sense in which the term ornament is used in the Rubrics of the Prayer Book, or whether it is nothing more than an architectural adornment or decoration.

If it is a church ornament, unless it is such an ornament as comes within the provisions of the Ornament Rubric of 1662, or would be subsidiary to the services of our Church as prescribed by law, it is not competent to this Court to grant a Faculty for its erection. The Ornament Rubric is in these words: "And here it is to be noted, that such ornaments of the Church, and of the ministers thereof at all times of their ministrations, shall be retained, and be in use, as were in the Church of England by the authority of Parliament in the second year of the reign of King Edward VI." The construction to be put upon the words "*ornaments of the Church*," and upon the words "*by the authority of Parliament in the second year of the reign of King Edward the Sixth*," as used in this Rubric, has been under the consideration of, and has been determined by, the Judicial Committee of her Majesty's Privy Council in the cases of *Westerton v. Liddell* and *Martin v. Mackonochie*. Their Lordships, in *Westerton v. Liddell*, say "The term '*ornament*' in Ecclesiastical Law is not confined, as by modern usage, to articles of decoration or embellishment, but is used in the larger sense of the word ornamentum, which, according to the interpretation of Forcellinis' Dictionary, is used

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‘pro quocumque apparatu, seu instrumento.’ All the several articles used in the performance of the services and rites of the Church are ‘ornaments;’” and further, “that the word ‘ornaments,’ as used in the Rubric of 1662, is confined to those articles the use of which, in the services and ministrations of the Church, is prescribed by the First Prayer Book of Edward the Sixth.” —Moore’s Special Rep., p. 156. Their lordships in that case came to the conclusion that ornaments of the church, not prescribed by the First Prayer Book of Edward the Sixth, and which are not consistent with and subsidiary to the performance of the services of our Church, are prohibited by law. In these conclusions the Judicial Committee expressed its concurrence in *Martin v. Mackonochie*, 2 Law Rep. P. C., p. 390.

It seems to me that the Ciborium, or altar canopy, as known and used in England at the time of the Reformation, was an ornament or article of church furniture within the meaning of the term ornaments, as used in the Rubric of the First Prayer Book of Edward the Sixth. It contains all the characteristics of a church ornament, whether as regards its form, the materials of which it was constructed, its symbolical signification, or the use to which it was applied, to which I have already referred.

But as the Baldacchino, or altar canopy, proposed to be erected is to be of marble or other durable material, and not of the materials used in the construction of the altar canopies in use at the time of the Reformation, this further question arises, whether a Baldacchino, or altar canopy of this description, is equally an ornament with the old altar canopies within the Rubric.

In the petition it is described as an architectural

adornment for the east end of the church. This is an inaccurate description of it. For if the Holy Table were removed from underneath it, the Baldacchino would be there without meaning. It never could seriously be proposed to erect a Baldacchino over a vacant space in the middle of the chancel for the sole purpose of adorning the east end of a church. It must, therefore, be taken to be an erection in connection with the Communion Table, and was so admitted by the counsel for the petitioners in argument.

If it is an erection in connection with the Holy Table, it must be either a structure so attached to the Holy Table as to form part of it, or a structure separate from the Holy Table, but in connection with it. If it were taken as something attached to the Holy Table so as to form part of it, the Table, with the Baldacchino added to it, would not be that decent Communion Table required by the 82nd Canon.

If it is not to be erected as attached to the Holy Table, but as a structure separate from it, and yet in connection with it, it is obviously an ornament.

It was described by the counsel for the petitioners as an architectural adornment of the Holy Table. But if the altar canopies in use in England before the Reformation were ornaments, there is no sufficient distinction, in my opinion, between the old canopies and the Baldacchino proposed to be erected, to take the latter out of the category of church ornaments. In form it is substantially the same, as it would project over and cover the whole of the Holy Table. It is suitable for the same purposes as the old altar canopies, and the circumstance of its being made of different materials does not, in my judgment, constitute a legal difference

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between them. The fact of its being constructed of a durable material, and of its being immoveable, does not deprive it of the character of a church ornament, otherwise it would be in the power of any individual, by making a change in the material, to legalise an article of church furniture, which had been excluded when made of different material. An Altar, or Communion Table of stone fixed to the building, would be equally a church ornament as a moveable Communion Table of wood.

If the Baldacchino is an ornament within the meaning of the Rubric, the next question for consideration is, whether it is one of those ornaments sanctioned by the First Prayer Book of King Edward the Sixth, and if not, whether it can be shown to be of use as subsidiary to the services of the Church. There is no mention or reference to altar canopies in the First Prayer Book of Edward VI. The only ornaments mentioned in the Communion Service of that book are the Lord's Table, God's Board, or the Altar, as it is indiscriminately called—the Corporas, Paten and Chalice; and the direction in the Rubric following the Prayer of Consecration, "that the Priest shall perform that ceremony without any elevation or shewing of the Sacrament to the people" is inconsistent with the retention of an ornament, which was introduced into this country and used, as already shown, for the purpose of exhibiting on high the reserved Sacrament.

The contemporaneous exposition of the law to be gathered from the authorities and practice supports this construction of the Rubric. It appears by North's Chronicles of the Church of St. Martins, Leicester, that under the Injunctions issued by Edward the Sixth in

1547, the churchwardens and other influential persons in the parish removed and disposed of the altar canopy belonging to the church (North, p. 97 and 102); and that on the accession of Queen Mary, when the High Altar in this church was re-erected, a yard and a quarter of red silk was purchased to cover the canopy of the Sacrament. (North, p. 129.)

The whole tenor of the discussion between Bishop Jewel and Dr. Harding on the subject of altar canopies and the Reserved Sacrament, which took place in 1564, and which has been already referred to, confirms this view. Again, in the year A.D. 1559, Queen Elizabeth, by virtue of her supremacy, issued certain Injunctions on Matters Ecclesiastical, by the 23rd of which directions are given for the taking away and destroying of all shrines, coverings of shrines, trindals, rolls of wax, pictures, paintings, and all other monuments of superstition; and to see that this, amongst other Injunctions, was complied with, certain Commissioners were appointed. From a return made to these Commissioners in A.D. 1566 by the churchwardens of 150 parishes in Lincolnshire, which has been published in Mr. Peacocke's "Church Furniture," pp. 45, 62, 74, 80, 94, 101, and 106, it appears that in several of the parishes canopies had been found and were removed by the churchwardens as monuments of superstition, indicating that at that time they were not deemed to be lawful church ornaments.

The Court was urged, by the counsel for the petitioners, to sanction the erection of the Baldacchino for the purpose of giving greater dignity and honour to the Holy Table in the Church of St. Barnabas. But the honour and dignity to be given to the Communion Table in our churches, I take it, has been provided for by the

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Rubrics and Canons, and I hold that it is not within the province of this Court to issue Faculties for the purpose of giving greater dignity or honour to the Holy Table, than the simple dignity which is prescribed by the law.

After much consideration, I have come to the conclusion that the Baldacchino, for authorising the erection of which a Faculty is prayed, is an ornament of the Church within the meaning of the Rubrics, and as it is not prescribed by the Rubrics, or can be regarded as in any way necessary or subsidiary to the performances of the services of the Church, I decline to order the Faculty to issue.

It is unnecessary for the Court, having regard to the ground on which it has deemed this application to be inadmissible, to consider the appeal to its discretion.

I am of opinion that Mr. Bowron is entitled to costs, and I condemn the petitioners in costs, excepting in the costs of those affidavits filed by him which do not bear on the legal question.

CONSISTORY COURT OF LONDON.

THE VICAR AND CHURCHWARDENS OF ST. MARY ABBOTS,
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THE INHABITANTS AND PARISHIONERS OF THE PARISH.

Public Footway—Churchyard—Faculty.

The use of a small strip of a churchyard, which had been closed for burials, was granted by Faculty, so long as it might be required for the purpose, for a public footway to be constructed outside the churchyard wall, the Court being satisfied that the reasonable convenience of the parishioners attending the church, as well as of the public, could not be otherwise provided for.

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If at any future time the ground in question were to cease to be required for this purpose, it reverts to the church.

The Court has no power to grant the freehold or fee of consecrated ground to a local board, or to any other person, but only the use of it by Faculty.

This was an application for a Faculty to enable the Local Board of Kensington to widen the road leading from Bayswater to High Street, Kensington, which passes along one side of the churchyard of St. Mary Abbots, Kensington. To do this it was necessary to throw the present footpath into the road and to make another footpath, which could be done by utilising a strip of the churchyard for the purpose. The evidence showed that it was for the manifest convenience of the public and of the congregation attending the church, that both the road should be widened and a new footway constructed, and that this could not be effected without

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the assistance of the Court, by its granting a Faculty for the making of a footpath either within or without a new wall and railing, which the Local Board proposed to substitute for the present churchyard wall, which separated this road from the churchyard.

Dr. Middleton moved for the Faculty, citing *The Rector of Walbrook v. The Parishioners*, 2 Robertson, 515; *Atwood v. The Churchwardens of Hammersmith*, 28th April, 1856; *Re Harrington, Incumbent of Brentwood*, 16th Dec. 1836, where a Faculty was granted for a disused church to be used as a church school-room: *Lacking and Frost v. The Rector of Willingate*, 30th May, 1839, where a Faculty for the erection of a church school on a churchyard was decreed: *Russell and others v. The Parishioners of St. Botolph*, where a Faculty for the erection of an infant school on consecrated ground was decreed, 5 Jur. N. S. 300; *St. Mary-le-Strand*, 3rd January, 1872, where a narrow strip of churchyard was thrown into the street.

Dr. TRISTRAM.—The Court is satisfied that it will be for the convenience of the parishioners when they attend the services of the church, as well as for the general public, that this road should be widened by throwing the present footpath into it, and that there should be a new footpath constructed by the side of the old one. This can only be done by the Court granting a Faculty for the construction of a footway within or without the churchyard. Faculties have been frequently granted for the construction of public footpaths within a churchyard: *Walter v. Montague and Lamprell*, 1 Curteis, 260. But there is only one case—and that a recent one—*The Case of St. Mary-le-Strand*, in which a piece of consecrated

ground has been allowed by this Court to be used as a public highway.

The adoption of the first course in the present case is objectionable, as it would involve the public having readier access to the churchyard than it has at present. The adoption of the second course is free from this objection, and, under the circumstances, the Court is prepared to sanction it. But the Court is asked to sanction a grant of this strip of consecrated ground being made to the Local Board. This neither the Vicar nor the Court has power to do. The freehold of the churchyard is in the Vicar for the use of the parishioners, subject to the jurisdiction of this Court, but the fee is in abeyance. The Court cannot give away what it has not got. It may, however, I think, by Faculty give a leave and licence for this strip of land to be used as a public footway, so long as it may be required for the purpose. If at any time hereafter it should cease to be so required, it will revert to the churchyard. The Faculty may issue in the above terms (a).

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(a) See *Vicar and Churchwarden of St. Botolph Without, Aldgate v. The Parishioners* (Harris Intervening), L. R. 1 Prob. 173.

CONSISTORY COURT OF LONDON.

VICAR AND CHURCHWARDENS OF TOTTENHAM

v.

VENN AND OTHERS (*a*).

(The Tottenham Faculty.)

Faculty for Alteration of Church—Opposition of Vestry—Architectural Objections—Convenience of Congregation—Costs—Diversion of Ancient Footways.

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An application for a Faculty was made for the following purposes :
(1) To raise the walls and the roof of an ancient church with a picturesque ivy-clad tower, and to add claristery windows; (2) To extend the east end of the church by constructing a chancel and two vestries; (3) To remove two galleries; (4) To re-arrange the sittings; and to repair the church.

The application was opposed by the defendants, with the support of a considerable majority of the vestry.

(1) *Held*, That for the determination of the questions raised, the Court should consider not only the wishes of the majority of the vestry, but also the comfort and convenience of the parishioners attending the church, as well as the interests of future parishioners.

(2) That as the raising of the walls and roof of the church, and the claristery windows, was opposed by the majority of the vestry and parishioners, and, according to the architectural evidence, would be detrimental to the picturesque appearance and architectural beauty of the church tower, this part of the application should be rejected.

(3) That as to so much of the plan as related to taking down the galleries, to making a chancel and vestries, and re-arranging and re-pewing the church, as it was supported by the majority of churchmen in the parish, and as its adoption would conduce to the convenience of the congregation, a Faculty should be granted; subject to a proviso that it should not issue until an order had been obtained from the Ecclesiastical Commissioners, and two justices of the peace,

(*a*) Reported L. R. 4 Adm. & Eccl. 221.

under 59 Geo. III. (c. 134, s. 39), sanctioning the diversion of the ancient footpaths necessary for the extension of the chancel.

(4) That as the defendants were partially successful, the petitioners should pay their proportion of the costs.

On the Ecclesiastical Commissioners declining to make an order under 59 Geo. III, c. 134, s. 9, the Court, by a subsequent order, directed the diversion of the ancient footpaths, substituting for them other convenient paths.

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Dr. Deane, Q.C., and W. G. F. Phillimore, for the February 2.
Petitioners.

Dr. Spinks, Q.C., and Dr. Middleton, for the Respon-
dents.

Cur. adv. vult.

Dr. TRISTRAM.—This is an application to the Court to decree a Faculty authorizing extensive alterations in, and additions to, the ancient parish church of Tottenham. March 25.

The Vicar and one of the Churchwardens are the petitioners, and the application is supported by far the major part of those parishioners who are churchmen.

The alterations proposed are—(1) To raise the walls of the nave and the roof of the church, with the addition of claristroy windows; (2) to make a slight addition to the nave and aisles at the east end of the church, and further to extend the east end of the church by constructing a chancel and two vestries; (3) to remove two galleries with the stairs leading up to the galleries; and (4) to re-arrange the sittings and re-pew the church.

The estimated cost of the proposed alterations is 4,500*l.*, the whole of which will be provided by voluntary contributions; 2,500*l.* of this sum has been already subscribed or promised, and there is every prospect that the remaining sum will be forthcoming when required.

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The application for the Faculty is opposed by Mr. William Webb Venn and Mr. Thomas Fox, two parishioners, who are supported in this opposition by a considerable majority of the vestry.

The main grounds of their opposition are—(1) That the church, as a whole, is an ancient and picturesque edifice, its ivy-clad tower being the oldest part of it, and that the raising of the roof, and especially the construction of a claristery, would materially diminish the picturesque appearance and architectural beauty of the tower; (2) that by the proposed alterations the number of available sittings in the church would be rather diminished than increased, and that the alterations are unnecessary; (3) that the erection of the chancel transept and choir vestry would interfere with certain footpaths passing through the churchyard, as well as with numerous monuments and graves.

The fact that the present application is in opposition to the recorded vote of the parish vestry is entitled to the consideration of the Court. The Court, however, in determining whether in the exercise of its discretion, it ought to grant or refuse the prayer for the Faculty in whole or in part, is bound to take all the circumstances of the case into its consideration. It is the duty of the Court to consult not only the wishes of the majority of the present vestry, but also to look to the comfort and convenience of those of the parishioners who attend the services of their parish church (*Jackson v. Sayer and Carson*, 37 L. J. Eccl. p. 9), as well as to the interests of future parishioners.

It appears by the evidence that the majority in vestry was composed principally of parishioners, who are not members of the Church of England. The vote of a

majority of a vestry so composed may fairly influence the Court in its decision in relation to the proposed alterations, in so far as they may be supposed to affect the picturesque or architectural appearance of the church, or the convenience of the public by diverting paths through the churchyard. But in matters connected with the comfort and convenience of those who attend the church, the Court is bound to give greater weight to the opinions of the majority of the members of the church.

The opinion of the vestry, that the raising of the walls and roof of the nave of the church, and the construction of a claristery, would damage the picturesque appearance and architectural beauty of the church, and especially of the tower, is, beyond all doubt, in accordance with the evidence produced in the cause. In addition to the opinion of non-professional parishioners, the opinion of the vestry on this point is confirmed by the affidavits of two architects, who have carefully inspected the church, Mr. Donald Campbell and Mr. John Thomas Woodward, and the correctness of their judgment is not impugned by any architectural evidence; and not even, I will observe, by Mr. Butterfield, the architect who prepared the plans and specifications for the proposed alterations, and who has made no affidavit in the cause. I therefore feel it my duty to reject this part of the application.

So much of the plan as relates to taking down the galleries, extending the east end of the church, making a chancel and vestries, and the re-arranging and re-pewing of the church, is supported by a considerable majority of churchmen in the vestry as well as of churchmen in the parish.

The objection that these proposed alterations do not

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increase the number of the available sittings would have weight but for the circumstance that very many (according to the Vicar about 200) of the present sittings are so placed and constructed that persons occupying them are unable to see or hear the officiating minister, and are also unpleasant, and even unhealthy. That such alterations are desirable appears to be the opinion of the Archdeacons of London and Middlesex, who have both visited the church; and they are approved of by the Dean and Chapter of St. Paul's, who are patrons of the living.

From the evidence before the Court, I have come to the conclusion that this part of the plan will greatly conduce to the comfort and convenience of those parishioners who are desirous of attending their parish church, by affording them more commodious and convenient sittings. The present church is without a chancel, and it appears to the Court that the erection of a chancel is most desirable.

I am, therefore, prepared to grant a Faculty for so much of the plan as relates to the taking down of the two galleries, and of the staircases leading to the galleries, the extension of the east end of the church, the making of a chancel and vestries, and the re-arranging and re-pewing of the church.

The Faculty should, however, provide that there should be seats or benches placed in those vacant spaces of the chancel, to which the attention of the Court was directed by the Counsel for the defendants.

The principal objection taken by the vestry to the extension of the east end of the church was, that it would necessitate the stopping up or a diversion of certain ancient footpaths passing round the east end of the church, and which have long been used as public foot-

paths. Whether these paths are of such a description as to preclude the Court under certain old decisions at common law from diverting them for the purpose of providing better church accommodation, does not clearly appear; but the objection may be met in the manner suggested by Dr. Deane, that the Faculty should not issue out of the Registry until an order has been obtained from the Ecclesiastical Commissioners and two justices of the peace under 59 Geo. III. c. 134, s. 39, sanctioning the diversion of the footpaths. Upon such an order being obtained, this Court would be prepared to issue a Faculty, or to insert a provision in the present Faculty, upon a further citation being published, for the construction of a new footpath in such a way as would most conduce to the convenience of the parish.

As the defendants had, in the judgment of the Court, reasonable ground for appearing, in the interests of the parish, before the Court in their present application, and have been successful on an important part of the application, I think they are entitled to their costs of appearing, and I will give directions to the Registrar as to the manner in which I think the costs should be taxed.

W. G. F. Phillimore for the Petitioners. The Ecclesiastical Commissioners have refused to make an order for the diversion of the footpath under 59 Geo. III. c. 134, s. 39, on the ground that it has not been their practice to exercise jurisdiction under this section. He, therefore, asked the Court to amend the former decree by ordering the deviation of the footpaths required for the extension of the chancel.

Dr. Spinks, Q.C., contra.

1874.
March 25.
VICAR AND
CHURCH-
WARDENS OF
TOTTENHAM
v.
VENN
AND OTHERS.

July 20.

1874.
July 20.

VICAR AND
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WARDENS OF
TOTTENHAM
v.
VENN
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Dr. TRISTRAM.—The Court orders, “That the former Decree be amended by striking out so much thereof as directs that the Faculty or Decree shall not issue out of the Registry until an order has been obtained from the Ecclesiastical Commissioners and two justices of the peace under 59 Geo. III. c. 134, s. 39, sanctioning the diversion of the footpaths, and by adding a proviso thereto that the Faculty shall not issue until a further Faculty has been decreed, authorizing the petitioners to make a new footway at their own cost round the east end of the church in lieu of, and of the same dimensions as, the present footway; and a further proviso, that the said new footway shall be constructed before, or at the same time as the works for extending the chancel are being carried on.”

CONSISTORY COURT OF LONDON.

THE OFFICE OF THE JUDGE PROMOTED BY EVANS, Clerk,
against
DODSON.

Removal of Ornaments by a Churchwarden without a Faculty, against wish of Minister, illegal—Order for their Restoration refused—Costs.

1874.
November 23.

The rector, the promoter of this suit, placed, without a Faculty, and without the concurrence of the churchwardens, two collection boxes immediately above the two ancient poor boxes at the west end of the church, with an inscription: “For the Altar Flowers.”

The defendant, as senior churchwarden, objected to their remaining there, on the ground that they intercepted alms from the poor.

His objection being disregarded by the curate in charge, they were removed by the churchwarden’s orders.

The rector articulated the defendant for having removed them without authority, and prayed the Court to admonish him for having so done, and to order him to replace them in their former position, and to condemn him in costs.

(1) *Held*, That the defendant had committed an offence against Ecclesiastical Law by removing the boxes without the sanction of a Faculty.

(2) That it would not be a proper exercise of the discretion of the Court to order their restoration in opposition to the wishes of both the churchwardens, who must be assumed to represent the parishioners, as they were not directed to be placed in a church by the Rubrics, or the Canons.

(3) That the Court was bound to admonish the defendant for having removed the boxes without lawful authority, and to admonish him not to repeat the offence.

(4) That the defendant ought to pay the costs necessarily incurred by the promoter for the purpose of obtaining the admonition, and of opposing the admission of the defendant's original plea; but that the promoter ought to pay the costs incurred by the defendant in resisting the order for the restoration of the boxes.

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November 23.

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OF THE JUDGE
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against
DODSON.

Dr. Middleton for the Promoter.

October 30.

B. Shaw for the Defendant.

The material facts of and arguments on the case are embodied in the Judgment.

Cur. adv. vult.

Dr. TRISTRAM.—This is a proceeding by Articles promoted by the Rev. Dr. Evans, the rector of the parish of St. Mary-le-Strand, against Mr. Robert Dodson, the senior churchwarden of that parish, for having, on the 1st of December, 1873, caused two boxes, which were fastened to the west wall of the church of St. Mary-le-Strand, and intended for contributions for altar flowers, to be forcibly taken down and removed from the church

November 23.

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against the wish of Dr. Evans, and without lawful authority. The promoter prayed the Court to pronounce Mr. Dodson, for this act, to have offended against the laws ecclesiastical; to admonish him not so to offend in future; to order him to replace the boxes in their former position in the church, and in a proper condition; and to condemn him in the costs of the suit.

The defendant, in his responsive plea, admitted that the boxes had been removed by his authority and against the wish of the rector, but alleged (amongst other matters) that they had been originally placed in the church by the rector without a Faculty, and without the concurrence of the churchwardens; that they had been retained there contrary to the wish of the present churchwardens; that they were the private property of the rector, and not the property of the churchwardens as goods of the church; and that they practically diverted the contribution of alms from the two ancient poor boxes, which were, in accordance with the 84th Canon, placed at the west end of the church. He also alleged, that these boxes had since their removal, but before the commencement of the suit, been replaced by a similar one under the sole authority of the rector, and prayed to be dismissed from the suit with costs. The promoter, in his reply, admitted that the boxes had been placed in the church without a Faculty, and that the boxes removed had been replaced by a similar one by the rector's sole authority.

At the hearing Dr. Evans was, through illness, prevented from being examined. In support of the Articles, the principal witnesses examined were the Rev. Mr. Bailey, his curate, and the persons employed in removing the boxes; and for the defence, Mr. George Smith, who was

the senior and acting churchwarden when the boxes were put up, and Mr. Dodson, and Mr. George W. Cole, the present junior churchwarden.

The facts material for the decision of the Court as proved were substantially these. The two boxes in question, upon the lid of each of which was an inscription, "*For the Altar Flowers*," were in the early part of 1872, and shortly after the completion of the restoration of the church under the direction of Dr. Evans, but without the assent of the then churchwardens, fastened to the inside of the west wall of the church, each by two screws, about two inches above the two poor boxes. Until Easter, 1873, when Mr. Dodson became the senior churchwarden, no active objection appears to have been taken to this. He, however, then, as acting churchwarden, felt it his duty to have them removed from their position over the side of the poor boxes, as he considered they intercepted alms from the poor boxes. He stated that he himself personally entertained objections to their being in the church at all; but that from a desire to conciliate the rector, he did not press his objections until a practice was introduced of having additional collections for the altar flowers by a bag held near the poor boxes on certain Sundays, as the congregation was leaving the church; that he urged upon the curate in charge of the parish the discontinuance of these two modes of collecting for the flowers; and that his wishes having been disregarded, he gave orders for the removal of the boxes, which was effected peaceably, and without damage either to the wall of the church or to the boxes, but admittedly contrary to the wish of the rector. He stated that in giving the order he had no intention to commit a breach of the law. It also appeared that the churchwardens had

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no control over the money collected in these boxes, nor even over the money collected at the Offertory, although the Bishop of London, on being appealed to under the Rubric by the churchwardens, had advised that they should have a voice in the distribution of the Offertory moneys. Both the present churchwardens (who were elected according to custom by the parish) objected to the restoration of the boxes.

The forcible removal of these boxes by Mr. Dodson, in opposition to the wishes of the minister of the parish, and without the sanction of a Faculty, was clearly a violation of Ecclesiastical Law.

When a church ornament, whether it be or be not used in the services of the church, has been placed in the church by the minister, though without the sanction of a Faculty, or even of the churchwardens, however objectionable it may be, or seem to the churchwardens to be, they are not at liberty of their own authority to remove it. The churchwardens have only the custody of the church under the minister: *Lee v. Matthews*, 3 Hagg. Eccl. Reps. 173.

Their office in regard to the acts of the minister in the church, and in regard to the ornaments of the church introduced by him, is one of observation and complaint, and the power of redress is not in their own hands: *Hutchins v. Denziloe*, 1 Haggard's Consistory Reports, 173; *Kitchings v. Cordington*, L. R. 3 Adm. & Eccl. 123.

The proper course for a churchwarden in such cases is to apply to the registry of the Consistory Court of the diocese for a citation to issue, calling upon the minister to show cause why a Faculty should not be decreed for the objectionable ornament to be removed, it having

been placed there without lawful authority. Care, however, should be taken not to charge the minister with having committed an ecclesiastical offence in placing it there, so as to prevent the case from coming within the provisions of the Church Discipline Act.

Mr. Dodson having therefore been guilty of a breach of ecclesiastical order, (although, I think, unintentionally so,) in causing these boxes to be moved contrary to the wish of the rector, and without lawful authority, the Court is bound to admonish him for having so done, and further to admonish him to refrain from committing the like offence in future. The promoter, however, asks for more than this, namely, that the Court should order him to restore the boxes, and replace them in their former position in the church. Mr. Shaw, as counsel for Mr. Dodson, objected to the Court making such an order, as being without its jurisdiction, on the ground that the boxes were the property of Dr. Evans, and not of the church, and that his remedy was, therefore, at Common Law. For the purposes of the decision I am about to give, it is unnecessary for me to enter upon the consideration of the question, whether upon the facts proved these boxes may or may not be taken to be the property of the church, or the further question, whether the Court has not jurisdiction to make an order on a churchwarden, who is the officer of the Ordinary, to restore an article of church furniture which he, in the supposed exercise of his duty as churchwarden, has improperly removed from the church, to which he obtained access for that purpose by virtue of his office. But what is now asked of the Court by Dr. Evans is, to make an order which would have the force of a Faculty, authorizing these two boxes with an inscription

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on each, "For the Altar Flowers," to be restored and fastened to the walls of the church, and there to remain in future, and this in opposition to the expressed wishes of both the churchwardens, who were elected by the parish, and who may, therefore, be fairly supposed to represent the parishioners on the question.

The only box or chest for receiving contributions required by the Canons to be placed in the parish church is a chest or box for receiving contributions for the poor: see 84th Canon. In practice, boxes for contributions for other objects are sometimes, and, I think, may be without objection, placed in a parish church, more especially for receiving contributions for the repairs of the church and the expenses of the church services, since the passing of the Compulsory Church Rate Abolition Act. But the boxes in question are intended to receive contributions for a special object for which no provision is made in the Rubrics or Canons, and to which objections are taken by some, and I have, therefore, come to the conclusion that it would not be a proper exercise of the discretion of the Court to make an order for their restoration.

The remaining question of the costs is one to which the Court has given much consideration. It would have been glad to have been relieved from the necessity of making any order as to costs, in a case where one of the parties is a churchwarden, who has committed an offence against ecclesiastical law through a misconception of his official powers, and the other the rector of the parish, who has been a most liberal contributor towards the restoration of the parish church. In strict justice, however, I think the promoter is entitled to such costs as he necessarily incurred in order to obtain the admonition I am about to pronounce against

Mr. Dodson, and also to the costs incurred by him in opposing the admission of the defendant's original responsive plea; but on the other hand, I consider the defendant is entitled to such costs as were fairly incurred by him in resisting the order for the restoration of the boxes.

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Any question that may arise on the taxation of costs may be referred to me at chambers if the parties desire it.

The Court pronounces the articles to have been proved, and that the defendant has offended against the laws Ecclesiastical in removing the boxes complained of, and admonishes him not to so offend in future, but rejects that part of the promoter's prayer, which asks the Court to order the restoration of the boxes in the church.

The order for costs will be to the effect already mentioned.

CONSISTORY COURT OF LONDON.

SERJEANT AND OTHERS *v.* DALE.

(The St. Vedast Faculty.)

*Removal of Reading Desk, Clerk's Desk, and Pews, without a Faculty.—
Their Restoration ordered.*

The Rector, unauthorized by a Faculty, or even by the vestry, removed the reading desk, the clerk's desk, and certain pews from the

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church, and placed at the east end of the church choristers' benches. The churchwardens, with the concurrence of the vestry, petitioned for a Faculty directing the replacement of the reading desk, clerk's desk and the pews, and for the removal of the choristers' benches.

The Rector asked for a Faculty confirmatory of the alterations.

Held, That the reading desk being directed by the 82nd Canon to be provided at the charge of the parish, and the clerk's desk and pews being the common property of the parish, and it being the wish of the vestry that they should be replaced, the petitioners were entitled to a Faculty for their restoration, and also for the removal of the choristers' benches, on their providing convenient seats elsewhere for the choristers.

The Rector condemned in costs.

February 8.

Dr. Middleton for the Petitioners.

W. G. F. Phillimore for the Defendant.

February 15.

Dr. TRISTRAM.—The petitioners in this case are the churchwardens, and the defendant, the Rev. Thomas Pelham Dale, is the rector of the united parishes of St. Vedast and St. Michael's-le-Querne, in the City. The petitioners complain that the rector, in the month of November, 1873, without a Faculty, or even the sanction of the vestries or churchwardens of the united parishes, made certain alterations in their parish church, which were subsequently condemned—first, in December, 1873, by a vote of the vestry of St. Michael's-le-Querne, accompanied by a request to the rector to restore the church to its former state; and afterwards, in April, 1874, by a vote of the joint vestries of the united parishes. The alterations in question are the removal of the reading desk and clerk's desk, minor alterations in certain pews, and the placing of rows of benches or platforms for choristers in the east end of the church; and the petitioners ask the Court to issue a Faculty authorizing them

to restore the desks and pews to their former state, and to remove the choristers' benches.

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The rector, whilst admitting that he acted illegally in making these alterations without a Faculty, says he did so in ignorance of the law, and prays for a Faculty confirming his acts, on grounds I shall presently advert to. This application is strenuously opposed by the churchwardens, with the support of the vestries.

After the close of the argument at the last sitting of the Court I inspected the church of St. Vedast, in the presence of the proctors and the parties to the suit. The church was rebuilt by Sir Christopher Wren, and the pulpit and other parts of the interior are decorated with handsome wood carving said to be by Grinling Gibbons. The wood-work of the reading desk and clerk's desk is in the belfry; and from the explanations given to me, as well as from the plans since filed by the rector, they do not appear to have been out of character with the pulpit. There is no chancel, in the ordinary acceptation of the term, and although the alterations complained of were made in the east end of the church, which in the pleadings is styled the chancel, it was not contended on the part of the rector that he had any special control, *quâ* rector, over that part of the church. The alterations were obviously made for the accommodation of the choir, and so as to enable the officiating clergyman to sit with the choir.

The onus of satisfying the Court that it ought to grant a Faculty confirmatory of the alterations is upon the rector, and the grounds upon which he bases his application are that they are trivial, are for the convenience of the performance of Divine service, and have been approved of by a great majority of the congregation.

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Upon the evidence they would appear to have met with the approval of nine parishioners, two only of whom are ratepayers, and of a considerable number of non-parishioners who more or less attend the services at St. Vedast; but, in a question of this nature, the wishes of non-parishioners can have no weight with the Court.

On the other hand, the voice of the parish has been pronounced strongly against the alterations. For they are opposed not only by the four churchwardens who promote this suit, but have been condemned by a vote of the vestry of St. Vedast; by a subsequent resolution, carried by 19 to 2 in a joint vestry of the united parishes, and by 60 out of 100 ratepayers; and by a large number of other inhabitants, non-ratepayers. It was urged by the learned counsel for the rector, that as the churchwardens, with one exception, and the principal ratepayers, were non-resident in the parish, and were consequently not in the habit of attending the services of the church, the Court ought not to be influenced by their opinion. But I do not think I ought on that account to disregard their opinion, more especially as it appears that in 1872 a sum of 924*l.* was expended in repairing and restoring the church, part of which was contributed from a trust fund, but the remainder by a church rate raised in the parish of St. Vedast. The opposition to the alterations is grounded on an objection that parishioners have to the introduction of a choral service, and to certain observances which have been recently introduced into the services, and in consequence of which, according to Mr. Serjeant, who is a resident churchwarden, and has been a regular attendant at his church for thirty years, many of the parishioners are deterred from resorting to the church.

In considering the propriety of sanctioning the removal of the reading desk, the clerk's desk, and the alterations in the pews, it is not unimportant to observe that they are the property of the parishioners, the reading desk being directed to be provided by the 82nd Canon at the charge of the parish, and the clerk's desk and pews are the common property of the parish for the use in common of the parishioners: *Fuller v. Lane*, 2 Adds. 425.

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The Court is, therefore, now asked by the rector to give its sanction to certain alterations made by the rector in what is the property of the parish, without the previous sanction of the parish, and which has met with the general disapproval of the parishioners.

There is no doubt a discretion vested in the Court in granting or refusing Faculties for alterations in a church. But it has been the practice to give great weight to the wishes of the vestry.

Under the circumstances I do not think it would be a proper exercise of the discretion of the Court to accede to this part of the application against the strongly expressed wishes of the parishioners. In regard to the seats for the choir, I think they should not have been introduced by the rector without the sanction of the vestry, and if there was a difference of opinion as to their introduction, the matter very properly might have been referred to the Archdeacon for his decision, so as to avoid the expense of litigation in this Court. They do not appear to me to be an ornament to the church; but as the vestry desire them to be removed, I think an order should go for their removal, such removal not to take place until the churchwardens shall have provided convenient seats for the choir elsewhere in the church. It is customary and convenient for the choir to sit together,

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and I think that the rector may reasonably ask for seats to be provided for them with this object.

The Court, therefore, rejects the application of the rector, and orders a Faculty to issue to the churchwardens authorising them to replace the clerk's desk and the reading desk, and to restore the pews to their former condition, and to remove the seats for the choristers, such removal, however, not to take place until convenient sittings for the choir have been provided elsewhere in the church. Any questions as to the seats for the choir to be referred to me in chambers.

The rector to pay the petitioners' just costs, but in taxing the costs the rector to be allowed for the costs of the plan brought in by him since the hearing.

CONSISTORY COURT OF LONDON.

ST. GEORGE'S-IN-THE-EAST FACULTY (a).

The First Faculty granted for laying out a closed Churchyard as a Garden for the Use of the Parishioners.

1876.
April 3.

The Rector and Churchwardens of the parish of St. George's-in-the-East applied for a Faculty, authorizing them to lay out a portion of the closed parochial churchyard as a garden for the use of the parishioners, and to make proper access thereto.

Held, That as the application was supported by an unanimous vote of the vestry, and by the expressed wish of the parishioners generally,

(a) Reported 1 Prob. Div. 311.

the Court, having due regard to times and circumstances, and the rights and interests of all parties concerned, would exercise a sound discretion in granting the Faculty.

1878.
April 3.

ST. GEORGE'S-
IN-THE-EAST
FACULTY.

The Faculty granted.

Dr. Deane, Q.C., moved for the Faculty, and examined witnesses in support of the application.

March 4.

Cur. adv. vult.

Dr. TRISTRAM.—This was an application to the Court by the rector and churchwardens of the parish of St. George's-in-the-East to issue a Faculty authorizing them to appropriate the further or lower end of the eastern portion of the parochial churchyard as a public garden, and to make proper access thereto, and other alterations in furtherance of the said object.

April 3.

On the Faculty being moved for, it seemed to the Court that there were objections to granting it in the terms prayed; but as the application was made in accordance with an unanimous vote of the vestry, and with the general concurrence of the parishioners, the Court directed the case to stand over for further evidence, and for consideration.

In the interval I have inspected the churchyard, and the rector, the churchwardens, and vestry clerk attended a Court held on Monday last, and gave further evidence and explanations in support of the application.

The application in question relates to that part of the eastern portion of the churchyard which is furthest from the church, comprising a narrow strip of the old churchyard, and a considerable piece of ground which was acquired by the parish by purchase out of the church rates in 1829, and was then added to the old churchyard and consecrated.

1876.
April 3.

ST. GEORGE'S-
IN-THE-EAST
FACULTY.

In 1856 the churchyard was by an Order in Council closed for burials.

This addition to the churchyard has been but little used for burials. It contains a few gravestones, but no grave mounds. It is planted with some clumps of trees and flower beds, and there are gravel walks across and around it. It abuts on the south side on Ratcliff Street, which leads into Ratcliff Highway; on the north side on a Wesleyan burial ground running up to Cable Street. It is fenced in on the north and south sides by high walls, which impede the free circulation of air between Cable Street and Ratcliff Street.

Arrangements have been made by the vestry, with the sanction of the Metropolitan Board of Works, to purchase out of funds secured or raised by parochial rates the Wesleyan burial ground, with the view of laying it out and planting it as a garden for the use of the parishioners, with an entrance to it from Cable Street; and the Court is asked to sanction a somewhat similar plan of planting and laying out this portion of the churchyard. The scheme involves the taking down of a portion of the high walls on the north and south sides of the churchyard, the removal of certain tombstones, which it is proposed to place against the wall of the churchyard, the fencing off of the old portion of the churchyard, with the exception of a narrow strip, by iron railings, the continuance of the footpath from the Wesleyan burial ground through the new portion of the churchyard to Ratcliff Street.

The plan in question was unanimously approved of by a large meeting of the parishioners convened by the rector and churchwardens in March, 1875, on the understanding that it was not to involve the disinterment of

any bodies or remains. This meeting led to a petition signed by 700 of the parishioners, including the principal ratepayers, being presented to the vestry urging the vestry to take the steps requisite to carry out the scheme, and to a subsequent unanimous vote of the vestry in approval of it.

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ST. GEORGE'S-
IN-THE-EAST
FACULTY.

On principle and the cases I entertain no doubt that it is not competent to this Court to grant a Faculty authorizing a churchyard to be appropriated as a public garden: see *The Queen v. Twiss*, 4 L. R. Q. B. p. 407. But the churchyard is under the control and protection of the Court, and it is in the discretion of the Court to authorize by a Faculty the construction of footpaths in it for the convenience of the parishioners (*Walter v. Montague and Lamprill*, 1 Curteis, 260), the removal of high walls which obstruct the free circulation of air, the planting of it with trees and with flowers, as it is closed for burials, and the erection of gates in order to give the parishioners access to it, and other minor alterations. In the exercise of this discretion the Court is bound, in the words of Sir John Nicholl, "to exercise a sound discretion, having a due regard to times and circumstances, and to the rights and interests of all parties concerned": *Butt v. James*, 2 Haggard's Eccl. Rep. p. 424.

In the present case, the parties interested, the parishioners, and the families of those who have been buried in this part of the churchyard, as far as the Court can ascertain, without a dissentient voice desire that the parishioners should have free access to this portion of the churchyard during certain hours.

The Court has jurisdiction to make an order which will give them such access; and if it makes it, it does not confer on the parishioners of St. George's-in-the-East any

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April 3.
ST. GEORGE'S-
IN-THE-EAST
FACULTY.

greater rights, in regard to their churchyard, than that which is enjoyed by the parishioners of very many country parishes, or even of very many town parishes in England. If it sanctions, directly or indirectly, the ground being planted with flowers, it will be doing nothing that can be construed as desecrating or altering the character of the place, or as offering any disrespect to the dead. Where tombstones are removed it will take care, that the places of interment are so marked that the relatives or friends of those buried there will be able to distinguish the spot where they lie.

The removal of the high walls, which impede the free circulation of air between Cable Street and Ratcliff Street will, according to the evidence of the rector and churchwardens, conduce greatly to the health of the neighbourhood. The continuance of a footpath from Cable Street through the Wesleyan burial-ground and the eastern portion of the churchyard to Ratcliff Street will be a great convenience to many of the parishioners, saving them a circuitous route of about a quarter of a mile, when going from Cable Street to Ratcliff Highway, and it will have the further advantage, one which has great weight with the Court in considering the application, that it will give many of the parishioners living in the north part of the parish a much shorter road to their parish church.

The churchwardens and vestry are prepared to undertake so to protect this ground as to preclude the occurrence of anything in it open to just exception; and it will still remain subject to the order of this Court, to which application can at any future time, if required, be made.

The Court is prepared to issue a Faculty to give access

to the parishioners to this portion of the churchyard, and to make the other alterations indicated, and, in granting it, is satisfied that it is exercising a sound discretion, having due regard to the times and special circumstances of the case and the interests of all parties concerned.

Any application relating to the details of the Faculty may be made to me in chambers.

1876.
April 3.
ST. GEORGE'S-
IN-THE-EAST
FACULTY.

COMMISSARY COURT OF LONDON.

HARRISON *v.* BARRETT.

(In the Parish of St. Dunstan's, Stepney.)

The occupation by a Ratepayer of a Room in a Parish, to which he resorts for convenience or pleasure, is a good qualification for the office of Churchwarden.

Dr. TRISTRAM.—In this case Mr. F. E. Harrison, who is a resident in the parish of Bow, but who is also the occupier of a house in the hamlet of Ratcliff, in the parish of St. Dunstan, in respect of which he pays the rates and taxes, and in which he carries on no business, and the greater portion of which house is sublet by him, was elected by the majority of the vestry to be one of the churchwardens of Ratcliff. On his being proposed as churchwarden, objection was taken in the vestry to his qualification, and Mr. William Barrett, a resident in the parish of Ratcliff, was duly proposed and seconded, but obtained a smaller number of votes.

At the Visitation held by me on Friday last, as Commissary of the Diocese of London, Mr. Harrison applied

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to be admitted as churchwarden, as having been elected by a majority of the vestry. Mr. William Barrett objected to his admission on the ground that he had no sufficient qualification for the office, and claimed to be admitted himself. Whereupon Mr. Harrison, by Mr. Archer, the vestry clerk, objected that I, as Ordinary, had not jurisdiction to determine the question raised as to Mr. Harrison's want of qualification, and that the proper Court in which it should be raised is the Queen's Bench Division of the High Court of Justice.

It will be convenient that the Court should consider first the question of jurisdiction. It is laid down in some of the text-books that the office of the Ordinary in the admission of churchwardens is ministerial only. This proposition is, however, too general, and upon examination of the cases it will be found not to be sustained by the decisions. The cases establish that the Ordinary's decision on a question as to the regularity of the election is not conclusive, and is liable to be overruled by a mandamus. See *Rex v. Dr. Harris*, 3 Burrows, 1423, in which Lord Mansfield says that the Ordinary cannot try the legality of the votes of a vestry, and in so far his office is in a certain sense ministerial. There is also another old case, in which the refusal by an Archdeacon in Wales to admit as churchwarden a parishioner and ratepayer who had been duly elected by the vestry, on the ground of his poverty, was adjudged a bad return to a rule nisi for a mandamus. This might well be, for there is no discretion vested in the Ordinary to refuse to admit on such a ground.

In *Anthony v. Seger*, 1 Haggard's Consistory Reports, p. 9, Lord Stowell, sitting in this Court, refused to admit Mr. Le Cornu, a churchwarden of Ealing, although he

had been elected, on the ground that he was an alien, observing, "that it had been said that this would be a ground not for his rejection, but for a mandamus, but inaccurately; for offices the most ministerial leave a discretion not to join in an illegal act, and if a parish had returned a Papist, or a Jew, or a child of ten years of age, or a person convicted of felony, I conceive the Ordinary would be bound to reject. To say that a mandamus would lie is no objection, for the Ordinary is not to give way without the authority of some higher Court actually expressed; and though it is the duty of the Ordinary not to take slight objections, he is bound, I conceive, to take care that an election, in his opinion void in itself, should have no legal effect, and this is a duty which he owes to the parish, and to the general law of the country. The question is, then, whether the person who had the minority of votes is duly elected. Neither party having resorted to the method, which might have been taken, of applying for a mandamus, the question for the present was left open to the Court, and it therefore directed affidavits to be made of the facts."

It appears to the Court that the true rule on this point to be deduced from the cases is, that, where the election of a churchwarden is, in the opinion of the Ordinary, manifestly void, or where it is doubtful, and the parties are not prepared to have it tried by mandamus, the Ordinary has jurisdiction, and that it is his duty to inquire into and judge of his qualification. This latter doctrine is so laid down by Lord Stowell, not only in *Anthony v. Seger*, but subsequently in *Stephenson v. Langston*, 1 Hagg. Consistory Reports, 379, which was affirmed on appeal in the Arches by Sir William Wynne, and it had been so previously held in *Brook v. Owen*, in the Court of Peculiars, by Dr. Andrews, who

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was at the same time Dean of the Arches, and in other cases. See note to *Stephenson v. Langston*, 1 Hagg. Cons. Reps. 381—383.

I therefore hold that Mr. Navin, who appeared as solicitor for Mr. Barrett, was entitled to raise the question of Mr. Harrison's qualification before this Court.

On the question of Mr. Harrison's qualification, it is right to observe, that it is laid down by Gibson in his Code, p. 215, that a ratepayer, who is a non-inhabitant of a parish, is ineligible for the office of churchwarden. But this proposition is not sustained by the cases. Lord Stowell, in *Stephenson v. Langston*, 1 Hagg. Cons. Reports, p. 380, held, that residence in a parish was not a requisite qualification, and that Mr. Langston, who was a member of a banking firm in the city, though resident in Oxfordshire, and in the west end of London, having been elected, was bound to serve as churchwarden of the parish in the city in which his place of business was situated.

The only difference between that case and the present one is, that in the former case Mr. Langston was in the habit of attending at the Bank for business, and that in the present one Mr. Harrison does not carry on any business on his premises in the parish of Ratcliff.

The fact, however, that he resorts on many occasions to his premises in Brook Street for convenience or pleasure only, and not for business, does not, in the judgment of the Court, furnish ground for disqualifying him from filling an onerous parochial office to which he has been elected by the vestry.

There is no judicial decision in which this is held as a ground of disqualification. I am therefore prepared to admit him as churchwarden (a).

(a) Mr. Harrison, on the making the Declaration, was admitted as churchwarden.

COMMISSARY COURT OF LONDON.

JONES *v.* HAYWORTH.*Qualification for the Office of Churchwarden.*

An inhabitant ratepayer, in a parish constituted under 58 Geo. III. c. 45, is eligible for the office of churchwarden in such parish, notwithstanding that he is resident in a portion of a consolidated chapelry carved out of the old parish, under 8 & 9 Vict. c. 70; 14 & 15 Vict. c. 97, and 19 & 20 Vict. c. 55.

Dr. TRISTRAM.—At the Visitation held by me as Commissary of London shortly after Easter last, Mr. Stephen Hayworth, who resided at 108, Kingsland High Street, in the parish of West Hackney, but within the boundaries of the consolidated chapelry of St. Mark's, Hackney, applied to be admitted as parishioners' churchwarden of the parish of West Hackney. His admission was opposed by Mr. Edward Jones, who resides at 116, Stoke Newington Road, in the parish and ecclesiastical district of West Hackney, on the ground that he had not the qualification requisite to entitle him to admission, by reason of his residing in the ecclesiastical district of the consolidated chapelry of St. Mark's, which had become a distinct ecclesiastical parish under the operation of certain of the Church Building Acts.

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As the case was a complicated one, and could not be decided without the examination of witnesses, I adjourned the Court, and appointed a day for the hearing, but for the convenience of the parties the case stood over, and was heard on the 26th of November, when the parties appeared before the Court in person, and after

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the examination of witnesses on both sides I required the production of further documentary evidence, which has since been brought into the registry, and I am now in a position to give my decision on the question raised.

It appears that, in the year 1824, the old parish of Hackney was, by an Order in Council, issued under sect. 16 of 58 Geo. III. c. 45, divided into three separate parishes or rectories for ecclesiastical purposes, one of which was called the Rectory and Parish of West Hackney.

By sect. 73 of this Act, two fit and proper persons are to be appointed as churchwardens for the church, one by the rector for the time being, and the other *by the inhabitant householders*, entitled to vote in the election of churchwardens, residing in the district of West Hackney.

It appears that the parish of West Hackney, as thus constituted, has since been divided into at least three distinct parishes for ecclesiastical purposes, and that on one of such divisions a portion of West Hackney was formed into the consolidated chapelry of St. Mark's, Hackney, by an Order in Council of the 29th June, 1871, issued in pursuance of 8 & 9 Vict. c. 70, 14 & 15 Vict. c. 97, and 19 & 20 Vict. c. 55.

By sect. 6 of the first Act, two persons residing within the consolidated chapelry are to be appointed churchwardens, one by the minister, and the other by the householders residing within such consolidated chapelry, and the duties which they are to perform are specified in the Act. By sect. 8, it is provided that they shall not perform any other duties except those specified, and that all other legal duties appertaining to the office of churchwarden within such consolidated chapelry shall be per-

formed by the churchwardens who would have performed the same had the Act not been passed.

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According to the evidence, Mr. Hayworth has resided in the parish of West Hackney all his life, and has resided in his present house for sixteen years, and was churchwarden of the parish of West Hackney before and at the time the consolidated chapelry was constituted, and has annually been re-elected churchwarden ever since by the vestry of the whole parish, and has taken a great interest in parish matters, and regularly attends as churchwarden the parish church of West Hackney.

In addition to the ordinary duty of churchwarden in the church, he is trustee of some twenty charities, *quod* churchwarden, distributable amongst the parishioners of the whole parish, and has duties to perform as such trustee.

The first question for the consideration of the Court is whether, by reason of his being a resident within the consolidated chapelry of St. Mark's, he is disqualified from being elected as churchwarden in his old parish church.

It is to be observed that in the Act of 58 Geo. III. c. 45, under which the parish of West Hackney was constituted, there is no qualification specified for a churchwarden elected to such church, whereas, in 8 & 9 Vict. c. 70, one of the Acts under which St. Mark's was constituted, the churchwarden of a consolidated chapelry must be resident within the chapelry. I can find no words in the last Act which can be fairly construed as depriving by implication Mr. Hayworth of his right to act as churchwarden of West Hackney, and I have come to the conclusion, after much consideration, that as, on the show of hands, 102 were held up for Mr. Hayworth and 74 only

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for Mr. Jones, Mr. Hayworth was duly elected churchwarden, and is qualified to hold the office.

COMMISSARY COURT OF LONDON.

SEARELL v. ROWLANDSON.

(Christchurch, Cubitt Town.)

Qualification for Office of Churchwarden—Householder.

1888.
July 9.

Where the qualification for the office of churchwarden of a church is being a householder, the occupation of unfurnished apartments in a house with one outer door, common to the owner or other occupiers of apartments, does not constitute such occupier a householder within the Church Building Acts.

Where one of the parties disputing the regularity of the election of a churchwarden of a church, built under the Church Building Acts, is desirous that the regularity of the election should be determined by a civil Court, the proper course is for the Ordinary to admit both claimants as churchwardens.

Dr. TRISTRAM.—In this case, at my Annual Visitation held on April 9th, 1888, as Commissary General, Mr. Charles Searell and Mr. Robert Rowlandson both claimed to be admitted as the parishioners' churchwarden of Christchurch, Cubitt Town.

It appeared by the evidence given that the election was by a show of hands, and that nine were held up for Mr. Searell and seven for Mr. Rowlandson, but the latter objected that three of the persons, namely, Mr. Dixon; Mr. Wilson, and Mr. Robinson, who voted for Mr. Searell, had not the required qualification to entitle them to vote.

I adjourned the Court for further evidence, and on

the 7th of May Mr. Rowlandson appeared before me in Court and produced evidence which satisfied me that three of the votes given for Mr. Searell were bad, and I thereupon declared Mr. Rowlandson to have been duly elected, and admitted him.

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Subsequently, Mr. Searell lodged a complaint at the registry that he had received no notice of the Court, and was anxious to be heard on the question; and finding that, through his having stated at the Visitation that he did not press for his own election, notice had not been sent him, I announced that I would hold a Court on the 29th of May to hear evidence of both parties with a view to revoking my former order, if it proved to have been erroneous.

On the 29th of May both parties attended before me and examined witnesses, and by the evidence it appeared, that Mr. Dixon lived with his father, and was, therefore, neither a ratepayer nor householder, and that Mr. Wilson and Mr. Robinson occupied unfurnished apartments, two rooms each, in different houses, and were entitled to the lodger franchise at Parliamentary elections.

Two questions arise in this case, firstly, had Mr. Dixon, Mr. Wilson, and Mr. Robinson, the qualification required to entitle them to vote at the election of a churchwarden for this ecclesiastical parish?

The ecclesiastical parish of Christchurch, Cubitt Town, is a district chapelry created by an order of the Queen in Council, dated February 22, 1860, under 59 Geo. III. c. 134, s. 16; 2 & 3 Vict. c. 49, s. 3; and 19 & 20 Vict. c. 55.

By 8 & 9 Vict. c. 70, s. 6, the election of churchwardens of such a district chapelry is vested in the householders of the ecclesiastical parish.

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Mr. Dixon was living with his father, in his father's house, and therefore he is clearly not a householder. Mr. Wilson and Mr. Robinson each occupied unfurnished apartments in different houses. I take it that in law they should be described as lodgers, and not as householders; a householder is a person who occupies a house as master of it. A part of one house under the same roof cannot truly be said to be a house, unless it has become so by actual severance by having a separate street or outer door to it. The principal decision on this question is that of *Cook v. Humber*, 11 C. B. N. S. 33, in which Chief Justice Erle delivered the judgment of the Court, and in it quotes a passage from a judgment of Lord Holt (p. 48), which appears to me to be applicable to this case. "If inmates," says Lord Holt, "have several rooms in a house, of which rooms they keep the keys, yet, if they enter into the house at one outer door with the owner, these rooms cannot be said to be the dwelling-houses of the inmates" (Leach's Crown Cases, 90, in the notes to *Rogers' Case*, and a passage (p. 46) from a judgment of Lord Hardwicke's in *Fludier v. Lombe*, Cas. temp. Hardw. 307). "A lodger was never considered by anyone as the occupier of a house; it is not the common understanding of the word; neither the house nor any part of it can be properly said to be in the tenure and occupation of a lodger."

I am therefore of opinion, upon these cases, that Mr. Wilson and Mr. Robinson are not householders, and therefore were not entitled to vote.

The second question is, whether I have jurisdiction, sitting in this Court, to decide as to the validity or invalidity of the election of a churchwarden in a district chapelry?

If the question here raised related to the validity of

the election of a churchwarden for an ancient parish, the cases clearly show that the office of churchwarden is a temporal office, a churchwarden being an *ex officio* overseer of the poor by the Statute of Elizabeth, and having also the custody of the goods in the church, which belong to the parish. But the churchwardens of an ecclesiastical parish created by the Church Building Acts are not temporal officers in the sense in which churchwardens of old parishes are, or in any sense. Their duties are limited by the Church Building Acts to what relates to the church. No parochial duties are imposed upon them. These are still performed by the churchwardens of the original parish; and although the property of the goods in the church is vested in them, they are no longer now, as formerly, supplied by a compulsory church rate levied on all parishioners alike, but by voluntary contributions.

I am not aware that the question has ever been raised whether or not the Ecclesiastical Ordinary has jurisdiction to decide on the validity of the election of churchwardens elected under the provisions of the Church Building Acts.

It is not unusual for this Court to decide questions as to the validity of the election of churchwardens, with the consent of the parties, to save the expense of an action at common law, and it was my impression that both parties would abide by my decision that induced me in the first instance to embark in this investigation. But as Mr. Searell at the last Court expressed his desire to stand on his strict rights, the proper course of the Court is to admit him as churchwarden as well as Mr. Rowlandson, and then either party can take the opinion of the Common Law Division of the High Court, on a special case, as to which of the two candidates was duly elected churchwarden.

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I revoke so much of the order made on the 7th of May last as declared that Mr. Rowlandson was duly elected churchwarden, and I am now prepared also to admit Mr. Searell.

CONSISTORY COURT OF LONDON.

THE HAMPSTEAD PARISH CLERK'S FEE CASE,

Re WILLIAM LANGMEAD.

Parish Clerk of an original Parish—District Chapelries—Right to Fees.

1876.
Nov. 26.

A district chapelry, created by an Order in Council, under 59 Geo. III. c. 134, 2 & 3 Vict. c. 49, and 19 & 20 Vict. c. 55, is not equivalent to a district parish created under 58 Geo. III. c. 45, and the parish clerk of such a district chapelry is not entitled as of right to the parish clerk's fees within the district chapelry as against a clerk of the original parish, whose appointment dates prior to the creation of the district chapelry.

In such a case, the bishop may, under 19 & 20 Vict. c. 55, s. 14, award compensation to the parish clerk in lieu of fees.

May 8.

The questions raised in this case were referred to the Court by the Bishop of London to report its opinion thereon.

Witnesses were examined before the Court, and the case stood adjourned for argument by Counsel.

June 26.

Tremlett, as counsel for the Rev. F. W. Tremlett, Vicar of St. Peter's, Hampstead, argued against Mr. Langmead's claim.

Cur. adv. vult.

Nov. 26.

Dr. TRISTRAM.—The question raised in this case is

whether Mr. William Langmead, the parish clerk of the parish of Hampstead, who was appointed to that office in 1844, and licensed as such clerk by the Bishop of London in 1852, is entitled to the accustomed clerk's fees for the publication of banns, and for marriages and churchings performed in various churches which have been built and consecrated in his parish since 1852, and to which district chapelries have been assigned under Orders in Council issued in pursuance of 59 Geo. III. c. 134, 2 & 3 Vict. c. 49, and 19 & 20 Vict. c. 55.

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The clerks or vicars of three of these district chapelries, namely, of St. Paul's, St. Peter's, and St. Stephen's, having doubted Mr. Langmead's legal right to these fees, Mr. Langmead brought the question to issue by applying to the Bishop of London to award him compensation for the same under 19 & 20 Vict. c. 104, s. 12, and his Lordship thereupon referred the question in dispute to this Court for its opinion thereon.

Mr. Munro, clerk to the trustees of the parish of Hampstead, Mr. Langmead, the Vicars of St. Peter's, St. Paul's, and St. Stephen's, were examined before the Court, and the question raised was very fully argued by Mr. Tremlett, who appeared as counsel for the Vicar of St. Peter's. The first question raised was, whether Mr. Langmead was by law entitled to all parish clerk's fees payable in the parish of Hampstead immediately prior to the creation of these district chapelries.

Upon the evidence and upon the authorities, I think it is clear that he was entitled to such fees.

The next and main question was, whether, if he was entitled, his right to such fees had been taken away by sect. 10 of 59 Geo. III. c. 134, being one of the Acts by virtue of which district chapelries were assigned by

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the Orders in Council to these churches. By this section it is provided that, "when any parish shall be divided under 58 Geo. III. c. 45, or that Act, the fees belonging to the clerk of the parish, which shall thereafter arise in any district or division of any parish divided under the provisions of 58 Geo. III. c. 45, shall belong to, and be recoverable by, the clerk of each of the divisions respectively to which they shall be assigned," and the Commissioners for building churches are authorized in every such case to ascertain and make compensation to existing clerks for any loss they may sustain by reason of such division.

The question on this section is, whether a district chapelry created by an Order in Council under 59 Geo. III. c. 134, 2 & 3 Vict. c. 49, and 19 & 20 Vict. c. 55, is equivalent to, or synonymous with, a district or divided parish created under 58 Geo. III. c. 45. Upon an examination of these Church Building Acts, it will appear that the provisions for creating district chapelries are distinct, and carefully separated from the provisions relating to the creation of district parishes for ecclesiastical purposes, and it was on this ground that I intimated, during the hearing of the case, that I thought sect. 10 of 59 Geo. III. c. 134 did not apply to district chapelries, but I deferred giving my judgment in order that I might ascertain whether this point had ever been raised in the Courts of Common Law or Equity. Since the hearing I find that precisely the same question was raised in the case of *Aulton v. Roberts*, which was argued before the Court of Exchequer, and is reported in *Hurlston & Norman*, and 26 Law Journal, Exch. p. 380. In that case a district chapelry had been assigned to a chapel of ease at Ashted, in the parish of Aston, in the

county of Warwick, by an Order in Council dated the 8th of August, 1853, issued under 59 Geo. III. c. 134, and 2 & 3 Vict. 49 (being the same Acts under which the Orders in Council in the present case were issued), and giving to the incumbent of the district chapelry (as in the present case) the minister's fees for the publication of banns, and for marriages, churchings, and burials, but making no reference to the clerk's fees. And it is stated in a note to the report that an application to the commissioners to make compensation to the clerk under sect. 10 of 59 Geo. III. c. 134, (which is the course which Mr. Tremlett contended Mr. Langmead ought to have pursued,) had been refused on the ground, I assume, that this section did not apply to district chapelries. The parish clerk of Aston brought an action to recover the accustomed clerk's fees, which had been received by the clerk of the church at Ashted, from the date of the Order in Council in 1853, up to the commencement of the suit in 1857, and Chief Baron Pollock, in delivering the judgment of the Court, held that district chapelries did not come within sect. 10 of 59 Geo. III. c. 134, and that this section must be construed as limited to district parishes created under sects. 21, 22, 23, and 24 of 58 Geo. III. c. 45, and that, therefore, the parish clerk of Aston, as having been appointed to the office before the creation of the district chapelry of Ashted, was entitled to the accustomed clerk's fees for services performed at the church of Ashted.

The remaining question is, whether Mr. Langmead's right to the fees has been taken away by any subsequent Act. The only later Act affecting the subject is Lord Blandford's Parishes Act (19 & 20 Vict. c. 104). By section 14 of this Act, these three district chapelries have

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now become district parishes for ecclesiastical purposes, but the Act does not deprive existing parish clerks of their right to the clerk's fees in cases where they had not been deprived of them by previous Acts, but in section 12 distinctly recognizes their right to them, and requires the incumbent of the new church to keep an account of such fees, and every three months to pay them over to the clerk of the old parish until a vacancy in the clerkship, unless the bishop of the diocese shall award compensation in lieu of such fees, which by this section he is empowered to do.

I shall therefore advise the Bishop of London that Mr. Langmead, according to the correct construction of the Church Building Acts, is entitled to the parish clerk's fees for the publication of banns and for marriages and churchings in the churches of St. Peter's, St. Paul's, and St. Stephen's, by reason of his appointment prior to the creation of these district chapelries, and that it is a proper case for his Lordship to exercise the discretion vested in him under the 12th section of the last Act to award compensation to Mr. Langmead in lieu of such fees. It appears by the evidence that, since 1852, nine district chapelries have been created in the old parish of Hampstead, and that Mr. Langmead's fees as parish clerk would, if he were not entitled to the fees of these district chapelries, or to some compensation for the same, be reduced from 30s. per week to 10s. per week, exclusive of fees for funerals. It also appears that in six out of nine of these new parishes the clerks or clergy, by an arrangement with Mr. Langmead, pay over to him three-fourths of these fees, retaining the remaining one-fourth for themselves. It appears also, that the accustomed fees would, in the new parishes of St. Paul's and St. Stephen's,

amount on an average to about 6*l.* per year, and in St. Peter's to a smaller amount. It also appears that there are no clerks in these churches, but that the duties of the clerk are wholly or in part performed by vergers who are paid by salaries.

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As the 12th section of Lord Blandford's Act imposes upon the vicars of the new parishes the duty of accounting and paying over to the existing parish clerk of the old parish the clerk's fees, it seems to the Court that it would be more convenient for the vicars of the new parishes in future to pay a fixed sum to Mr. Langmead as compensation in lieu of fees, and I shall therefore advise the Bishop of London to issue an order to the vicars of St. Paul's and St. Stephen's to pay to Mr. Langmead respectively in future, so long as he shall continue clerk of the parish of Hampstead, 4*l.* 10*s.* per annum, and to the vicar of St. Peter's 1*l.* 17*s.* per annum, as compensation for the clerk's fees in their respective parishes. Upon the next vacancy in the parish clerkship of Hampstead, the clerk's fees will, of course, belong to the clerks of the new parishes.

CONSISTORY COURT OF LONDON.

ST. AUGUSTINE, HAGGERSTONE (a).

(Faculty Case.)

*Chancel Screen—Gates.*1877.
May 14.

A Faculty for gates to a chancel screen, it not being shown that the gates would afford any practical protection to the books and other church property in the chancel, refused: *Beal v. Liddell*, Moore's Special Reports, p. 77, referred to.

1877.
Feb. 27.

The Incumbent moved for this Faculty, and produced oral evidence in support of the application.

Cur. adv. vult.

May 14.

Dr. TRISTRAM.—The vicar and churchwardens of the parish of St. Augustine, Haggerstone, with the sanction of the vestry, have petitioned to the Court to issue a Faculty authorizing the erection between the chancel and nave of a dwarf wall, not exceeding in height 2ft. 1in., with entrance gates. To the dwarf wall, having regard to its dimensions, there is no objection, but it would be a departure from the general practice of the Court to grant a Faculty authorizing the introduction of gates to a screen in a parish church.

The only reported case in which the question of chancel screens with gates has been under consideration is that of *Beal v. Liddell*, in which Dr. Lushington, sitting in this Court, refused to order the removal of the chancel screen, with brazen gates, in the church of St. Barnabas, Pimlico, both of which were there at the time of its consecration, on the ground that, as they were not clearly

(a) Reported L. R. 4 Prob. Div. 112.

contrary to law, his wisest course was to abstain from exercising any discretionary power with which his office might be invested; but he added that, in his opinion, such separations between the chancel and nave were objectionable, and that he should not advise the Bishop to consecrate a church so fitted up. (Moore's Special Reports, p. 77.)

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Since the delivery of this judgment in December, 1855, it has been the practice of the Court to refuse to issue Faculties authorizing the erection of gates to chancel screens, or of chancel screens making an unusual and marked separation between the chancel and nave. In the present case the Court is asked to depart from the rule laid down by Dr. Lushington.

The petitioners did not appear by counsel, but I had the advantage of hearing an argument from Mr. Jeune on the points urged by them in a case involving the same question, that of the Church of the Annunciation, Chislehurst, which came before me as Commissary General of the Diocese of Canterbury, and which, for convenience, was heard immediately after the application now before the Court.

One argument advanced by counsel in favour of the gates was shortly this,—that before the Reformation chancel screens were a necessary adjunct to a parish church, being generally surmounted with a crucifix called the rood; that gates are the proper appendages to chancel screens; that though the rood was directed to be removed, and the rood loft to be altered (see Articles of Archbishop Grindal, Act 10, 3 Eliz.), yet the existing screens were allowed to remain (see Remains of Archbishop Grindal, p. 154, Parker's Society), and that the Rubric in Edward VI.'s second Prayer Book (1552), immediately

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before the morning prayer (which is retained in our present Prayer Book), having directed that the chancels shall remain as they have done in times past, a literal compliance with the Rubric would seem to require a chancel screen of some sort or other in all our churches. Such is the construction put upon this Rubric by Bishop Gibson in his Codex, p. 159, who there refers to and adopts the words of a note in Dr. Nicholl's Additional Notes on the Common Prayer by Bishop Cosins (first published in 1710), interpreting the Rubric as requiring "the chancel to be distinguished from the body of the church by a frame of open work," against which distinction (Bishop Gibson adds) "Bucer inveighed vehemently as tending only to magnify the priesthood; but though the King and Parliament yielded so far as to allow the daily service to be read elsewhere, if the ordinary thought fit, they would not suffer the chancel to be taken away or altered."

But this construction of the Rubric is not in accordance with contemporaneous or continuous usage. Thus Bishop Beveridge (see 6 Bishop Beveridge's Works, Anglo-Cath. Library, p. 367, one of the authorities cited), in a sermon preached in November, 1681, at the opening of the parish church of St. Peter's, Cornhill, remarked that that was the only church of those built in the city since the Great Fire of London in which the chancel was separated from the nave by a screen, and proceeded to vindicate the presence of the screen, not on the ground that it was placed there in compliance with the requirements of the Rubric, which had then been re-enacted only twenty years before, but by reason of its conformity with the long-continued usage of the Christian Church.

Moreover, in the Faculties which from time to time since the date of the Rubric have issued from this Court authorizing the restoration of alterations in churches, it has never been deemed imperative to require the chancel to be so separated from the nave.

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The construction contended for is also at variance with the expression of opinion by Dr. Lushington in *Beal v. Liddell*, to which reference has been made.

The presence of chancel screens in churches, with or without gates, being neither illegal nor imperative, the question whether either or both are to be allowed is left in the discretion of the Ordinary, and in this matter he should exercise a judicial and not an arbitrary discretion.

The arguments in support of the application addressed to the discretion of the Court were, that the application was unopposed, and that the gates would serve as a protection to the ornaments left in the chancel, and to the music books belonging to the choir, when the church was left open during week days for the poor to resort to.

The circumstance that no parishioner appears to oppose the Faculty is in favour of the petitioners; but the Ordinary, in granting Faculties, is bound to consider future as well as present parishioners, and even present parishioners may not without reason refrain from incurring the trouble or expense of opposing a Faculty in the expectation that the Court will take care that nothing is done manifestly to the prejudice, or which may do unnecessary violence to the religious feelings of any parishioners.

What the articles were that would really require special protection, or, if there were any such, why they could not be conveniently removed for protection, did

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not clearly appear; but a gate of 2ft. 1in. in height could form no effectual barrier against depredation.

As gates of such dimensions would be unavailing for the purpose of affording security, their significancy can only be construed to be for the purpose of exclusion, and to signify that the chancel is of a sacred character—distinguishable from that of the rest of the church.

Before the Reformation the gates would be placed there (and appropriately) with such significancy, as by the Canon Law the chancel had such character impressed upon it, and was reserved exclusively for the clergy. But the Reformation made an alteration in this respect, and since that time a lay rector has been entitled to the chief seat in the chancel, and the other seats in it have been and are in the disposition of the Ordinary for the use of the parishioners.

The introduction of gates as importing this significancy may cause offence to some parishioners, present or future, and may be construed as indicative of making the parish church the church of a party.

Our Prayer Book was originally framed, and subsequently revised, with the aim of making it acceptable to all parties in the Church, whilst the ordering of alterations to be made from time to time in the sacred building in which the Liturgy was to be used, in matters not expressly provided for, has been left advisedly in the discretion of the Ordinary.

To issue Faculties from this Court authorizing such alterations in a parish church as might make it unacceptable to any of the parishioners to whom our Liturgy is acceptable, would not, in my judgment, be a wise exercise of the discretion vested in the Court.

I see no good reason for departing from the general

rule established by Dr. Lushington, and I therefore reject that part of the prayer of the petition which asks the Court to sanction the erection of gates attached to the wall. The Faculty may go for the other alterations desired.

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COMMISSARY COURT OF CANTERBURY.

THE CHURCH OF THE ANNUNCIATION, CHISLEHURST (a).

Jeune appeared for the Petitioners.

Cur. adv. vult.

1877.
February 27.

Dr. TRISTRAM.—The Rev. Henry Lloyd Russell, the Vicar of the Parish of the Annunciation, Chislehurst, has petitioned in this case for a Faculty authorizing certain alterations and decorations in the chancel of the parish church, one of such alterations being the erection of a chancel screen of considerable height, in one part 13 feet 1 inch from the floor of the chancel, in other parts higher, with entrance gates, and a large cross on the top of the screen, its centre 2 feet 9 inches in height, and 2 feet 1 inch across the upper part. The plan of the proposed screen was, according to the practice of the diocese, submitted to his Grace the Archbishop of Canterbury for his Grace's approval before the citation issued, and his Grace declined to endorse his approval of it.

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I had the advantage of hearing Mr. Jeune in support of the application, who directed the attention of the

(a) Reported L. R. 4 Prob. Div. 114.

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Court to the various authorities bearing on the question. I have already stated in my judgment just delivered in the Consistory Court of London, in *The St. Augustine, Haggerstone, Case*, that I should adhere to the rule laid down by Dr. Lushington in relation to chancel screens and gates, and which will govern this case.

This case, however, differs from the former one in the description of the separation proposed by the plan to be made between the chancel and the nave, and in the erection of a large cross at the top of the screen in the centre in the position formerly occupied by the rood.

In reference to the plan of the proposed screen, the gates come within the rule laid down by Dr. Lushington, and the cross in the centre, having regard to its position and dimensions, might, I think, give offence, and I therefore decline to issue a Faculty for the erection of the screen according to the plan; but if the petitioner wishes to make modification in it, such as shall receive the sanction of his Grace the Archbishop of Canterbury, I should be prepared to grant a Faculty so altered.

As Mr. Russell says he is content that the Faculty should go without the gates and the cross, and as the screen is an open one, and does not in any way impede the view, and having been just informed by the Registrar that his Grace the Archbishop would not object to the plan as altered, the Faculty may go for all the matters prayed, except for the gates and cross.

CONSISTORY COURT OF LONDON.

Re THE CHURCH OF ST. JOHN, ISLE OF DOGS (*a*).

Gates to Chancel Screen—Church open during Day for Private Devotion
—*Faculty.*

A Faculty for a chancel screen with gates decreed on the Court being satisfied on the evidence, that the gates would be of practical use in protecting the music and other books and property in the chancel of the Church, which was kept open during the week for private devotion.

1888.
July 5.

The Rev. Maurice Stock, Curate in charge, moved for a Faculty for a classical screen with gates.

May 3.

Cur. adv. vult.

Dr. TRISTRAM.—In this case the Court was asked on the 3rd of May last to authorize the erection of a chancel screen with gates.

July 5.

It has been the rule of the Court to refuse its sanction to the addition of gates to chancel screens. This rule was established by Dr. Lushington for reasons stated by him in *Beal v. Liddell*, Moore's Spec. Reports, 77, and was followed by me in this Court *In re St. Augustine's, Haggerston*, L. R. 4 Prob. Div. 112, and in the Commissary Court of Canterbury in the *Chislehurst Case*, *Ib.* 114, and was subsequently approved of by Lord Penzance in the Arches Court in *Bradford v. Fry*, *Ib.* 106. It was not, however, proved in these cases that the gates were required or would be of service for the security of property which it was necessary to leave

(a) Reported 4 Times Law Reports, 661.

1888.
July 5.

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in the chancel, and therefore it was held that they only served to make a more marked severance of the chancel from the nave than was recognized by the Church, and so might occasion offence.

In the present case it has been proved to the satisfaction of the Court, that the gates proposed to be erected are necessary for the protection of property which cannot be conveniently deposited elsewhere than in the chancel of this church.

This is a poor parish. The population is about 7,000. The church is left open daily without an attendant from 8 a.m. to 8 p.m. for the use of the parishioners for private devotion, and is much resorted to by them for that purpose. The principal entrance is close to a frequented high road, and the chancel is the only place in which the choir books and the prayer books and hymn books, with which it is proposed to supply the whole of the congregation on the Sunday services, can with convenience be deposited during the week for safety.

The gates, from their design and dimensions—they are to be 4 feet high, with an intervening space of 5 or 6 feet from the top of the arch of the screen—indicate, as the curate in charge stated in his evidence, that they are only intended to protect the east end from unnecessary intrusion on week days, and not for the purpose suggested in the previous decisions.

Upon the above facts the Court has come to the conclusion that the present case may properly be made an exception to the general rule referred to, and in the exercise of its discretion will sanction the erection of the gates proposed.

CONSISTORY COURT OF LONDON.

THE ST. ETHELBURGA FACULTY CASE.

Confirmatory Faculty—Reredos of a description usual in Roman Catholic Churches Abroad, but not in Churches in England—Discretion of Court.

A wooden carving, containing thirty figures and forming no part of the structure of the church, the gift of a non-parishioner, was fixed at the east end of the chancel by the Rector, without the sanction of the vestry, and without a Faculty. The Rector applied for a Faculty, confirmatory of its erection. The application was unopposed.

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Held, (1) That the Court before granting the Faculty should be satisfied that it was sanctioning a fitting and necessary church decoration for the place where it is erected, and one not likely with reason to be unacceptable to parishioners present or future.

(2) That the present structure, though not an unlawful church decoration taken in detail, being of a description not heretofore erected in churches in this country, but frequently to be seen at the back of altars in Roman Catholic churches abroad, and having been disapproved of after inspection by the Bishop of London, it would not be a wise exercise of the discretion of the Court to sanction its retention by a Faculty.

The Court ordered its removal.

Dr. Middleton appeared for the Petitioner.

1877.
October 30.

Judgment reserved until the judge had inspected the reredos.

Dr. TRISTRAM.—In August, 1862, a Faculty issued from this Court on the petition of the Rector and the then Churchwardens of the parish of St. Ethelburga within Bishopsgate, authorizing certain reparations and renovations to be done in the parish church. These reparations and renovations were carried out, and some

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years afterwards, in addition thereto, a large wooden carving in compartments representing scenes of the Agony of Our Lord in Gethsemane, of the Crucifixion, of the Entombment, and of the Descent from the Cross, with two wings attached, to be closed during the week for the purpose of preservation, was erected at the east end of the church at the back of the communion table. This erection was clearly not authorized by the Faculty. The rector, the Rev. John Meadows Rodwell, now petitions the Court (amongst other things) to grant a Faculty confirmatory of the erection of this carving as a reredos.

It appeared by the evidence that the carving was the gift of a non-parishioner, and there was nothing to show that it had been accepted by a vote of the vestry. Upon this plan I saw no objection to granting the application, but on learning from the counsel and proctor for the rector that both Bishop Claughton, who as Archdeacon of London had visited the church, and the churchwardens, had taken some exception to it, I deferred giving my decision on the application until I should have an opportunity myself of inspecting the structure. I have accordingly visited the church, and I should state that the plan of the reredos filed in the Court failed to convey to my mind any adequate idea of the character of the ornament and structure.

The carving is placed in a framework, and is in three compartments, two Scriptural scenes being *now* represented in each compartment. There are in the several compartments upwards of thirty figures carved in relief, besides five representations of Our Blessed Lord. The figures are painted in various colours, and gilded. The structure forms no part of the building, but is placed against and affixed to the east end of the chancel, and

the upper part of it covers and obscures to a slight extent the lower part of the east window.

It did not appear to me that I could base a refusal to sanction the retention of this carving in the chancel on the ground of its being an unlawful decoration taken in detail. The only question, therefore, that remains for my consideration is whether it would be a wise exercise of the discretion reposed in the Court to sanction this particular reredos.

It is impossible to lay down any general rule for the guidance of the Court in the exercise of its discretion in all cases. The Rubrics and Canons prescribe certain ornaments to be allowed in our churches for use, but what architectural decorations or ornaments shall or shall not be allowed in our churches (saving such as are unlawful, as the Crucifix) was, at the time of the Reformation, and has been ever since, advisedly left to be determined by the Ordinary in his discretion, and the Bishops of London have been accustomed by letters patent (amongst other things) to vest their jurisdiction in such matters in the judge of this Court.

It is the duty, therefore, of this Court to exercise this discretionary power when occasion requires it. The mere fact that the rector of a parish petitions for a Faculty, and that neither the churchwardens nor any of the parishioners oppose the petition, is not a sufficient ground for the Faculty being granted, for if so, all unopposed applications for Faculties should be granted as of course. The Court before granting a Faculty should be satisfied that it is sanctioning a fitting or natural architectural church decoration for the place where it is proposed to be erected, and that it is not likely with reason to be unacceptable to parishioners

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present or future, for the Ordinary in granting Faculties is bound to regard the interests of parishioners present and future.

Their Lordships of the Judicial Committee of the Privy Council, in their judgment in *Liddell v. Westerton* (see Moore's Special Reports, p. 175), after deciding that crosses may be lawfully erected as architectural decorations of our churches, refer to the importance of the exercise by the Ordinary of this discretion in them, said :—" Their Lordships hope and believe that the laws in force respecting the consecration of any building for a church, and which forbids any subsequent alteration without a Faculty from the Ordinary, will be sufficient to prevent any abuse in this respect."

If the carving in question had resembled in character or description the reredos recently sanctioned in Exeter Cathedral, or others of a similar or other character such as have been from time to time advisedly sanctioned by this Court, the Court would have granted the Faculty without hesitation. But upon inspection it appeared to me to be quite unlike the Exeter reredos, which I have had the advantage of seeing, or any description of reredos or east-end decoration such as are to be seen in the churches of this country. On the other hand, it is an ornament of a description such as is frequently to be seen at the back of altars in Roman Catholic churches on the Continent.

Before it sanctions a novel mode of decorating the east end of the chancel the Court should, I think, be satisfied that the ornament is suitable to the chancel of an English church, and that it is not likely to give reasonable offence.

By the practice of the Court, plans for additions to or

alterations in churches are submitted to the Lord Bishop of London before they are filed in Court, and the Bishop endorses on the plan approval or such observations as his lordship thinks advisable for the assistance of the Court. In the present case his lordship endorsed on the plan his approval, and this was urged as an argument for the Court granting the Faculty, but as, on visiting the church, I ascertained that the plan had not conveyed to my mind an adequate idea of the nature of the decoration, I was anxious that his lordship should himself inspect it; and his lordship has since reported to the Court that he has seen the reredos, and that he cannot think it a suitable ornament for the chancel of an English Church, and that he should not have approved of it if he had been consulted on it before its erection. Such a report is entitled to the most serious consideration of the Court. I have come to the conclusion that it would not be a wise exercise of the discretion reposed in the Court to grant a Faculty confirming the erection of this reredos. I therefore reject that part of the application. On a previous court day I granted the other portion of the prayer of the petitioner. I order the holy table to be replaced by the churchwardens in the same condition as it was previous to its removal by them at the east end of the church within one week after the removal of the reredos. A certificate to be filed in the Registry of compliance with the order of the Court, and the case to stand over for further order.

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CONSISTORY COURT OF LONDON.

HANSARD AND OTHERS

v.

THE PARISHIONERS, INHABITANTS, AND OTHERS, OF
ST. MATTHEW, BETHNAL GREEN (a).

*Mortuary in a Churchyard—Objection for want of Interest in Suit—
General Grounds for granting a Faculty for a Mortuary—Proximity
to Dwelling Houses—Consequent Alteration of Site—Rooms for
Inquests—Living Rooms—Costs.*

1878.
April 15.

The Rector and Churchwardens petitioned for a Faculty for the erection of a mortuary in the churchyard of a crowded parish. Two owners of household property, in close proximity to the proposed site of the mortuary, being neither residents nor ratepayers, opposed the Faculty, on the ground that the mortuary would affect their property injuriously. On their interest being objected to—

Held, (1) That the possibility of the erection of the mortuary injuriously affecting their property gave them sufficient interest to oppose the Faculty.

(2) That a Faculty may properly be granted for the erection of a mortuary in a churchyard, where it is essential for the health of the parish that it should have a mortuary, and the churchyard is shown to be the most convenient site for its erection.

(3) That the site for the mortuary should not be unnecessarily in too close proximity to houses.

(4) That the Court ought not to sanction the erection of rooms for holding coroners' inquests, or living rooms, as adjuncts to a mortuary erected in a churchyard.

January 10,
14, 21, 28.

Dr. Spinks, Q.C., and *W. G. F. Phillimore* appeared for the Petitioners.

Locock Webb, Q.C., and *Droop*, for the Respondents.

(a) Reported L. R. 4 P. D. 46.

The examination of witnesses and arguments of counsel lasted for four days.

The facts and arguments upon which the case was decided are sufficiently given in the judgment.

Dr. TRISTRAM.—This is an application by the Rector and Churchwardens of the parish of St. Matthew's, Bethnal Green, for a Faculty authorizing the erection of a building at the south-west corner of the parish churchyard, the ground floor to be appropriated as a mortuary and *post mortem* examination room, the first floor for an inquest room and for the use of the coroner, and the second floor as living rooms for the keeper of the mortuary.

The grounds of the application are, that it is essential for the sanitary welfare of the parish that it should have a mortuary, and that owing to the crowded state of its buildings the Vestry have been unable to procure any other site for the purpose.

The granting of the Faculty is opposed by Mr. Henry Merceron, a gentleman who is not an actual resident in the parish, but who is possessed of considerable freehold property in it, including houses in the neighbourhood of the churchyard; and whose family have been settled in the parish since the revocation of the Edict of Nantes: and also by Mr. Arthur Wilson, a builder, who is also possessed of considerable household property in the parish. They filed an answer stating several objections to the granting of the Faculty, to which I will advert hereafter. The petitioners in their reply object to the defendants' right to be heard in opposition to the Faculty on the ground that they are neither inhabitants of the

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parish nor parishioners. Affidavits were filed by the respective parties in support of the case set up in their pleadings, and several of the deponents were cross-examined on their affidavits and were examined by the Court.

The first question for the determination of the Court is, whether the defendants or either of them have a *locus standi* to oppose this Faculty. It was argued by the counsel for the petitioners that to give a person a *locus standi* to oppose the granting of this Faculty he should either be a resident in the parish, or at least a ratepayer, but that Mr. Merceron and Mr. Wilson, according to the evidence, had at the present time no such status, and several cases were cited in support of this contention, including that of *Lee* against *Fagg* and *Mummery*, the latest decision on the question of interests: L. R. 6 Privy Council Cases, 36. The result of the decision appears to come to this, that to entitle a person to oppose the granting of a Faculty, he must show some interest in the subject matter of the application. In some cases the interest required will be that of a resident ratepayer, in others it may be of a different description. Take, for instance, the grant of a Faculty involving, among other things, the removal of a family vault. It cannot be contended that a representative of a family, for whose use the vault was granted, would be disqualified from appearing on the application to protect his interest in the vault, by reason of his being neither a resident nor a ratepayer in the parish. In the present case, independently of any general interest Mr. Merceron or Mr. Wilson may be supposed to have with a view to the interests of the tenants, present and future, of their property, Mr. Merceron is owner of certain houses in

Fuller Street. These houses form a part of a small block of houses, the front houses of the block being in Church Row, immediately opposite to and about thirty-two feet from the proposed building. As one of the purposes of the mortuary is the reception of bodies of persons who have died from infectious diseases, and as Mr. Merceron's houses in Fuller Street are just at the back and in close connection with the houses in Church Row, and not more than seventy yards from the proposed building, it occurred to me, especially on inspecting the site, that the Court ought not to hold that Mr. Merceron was without a possible interest in this suit. For if by any means whatever, whether owing to the close proximity of the mortuary, or to the want of proper precaution, infection were to spread to the houses in Church Row, this might injuriously affect houses in Fuller Street. The true test of an interest in cases of this kind may often be whether the erection of a mortuary may by any possibility affect the interest of the property of the opponent.

I will now proceed to consider the objections taken by the counsel for the defendants to the issuing of the Faculty prayed. It was said that the appropriation of a portion of the churchyard for any of the purposes named is contrary to law, as being the appropriation of consecrated ground for secular or profane purposes. It appears to the Court, for reasons which I will presently state, that this objection has force in reference to that part of the application which relates to the erection of rooms for the holding of coroners' inquests, and for living rooms of the keeper of the mortuary, but not to the erection of the mortuary itself, which was aptly expressed by Dr. Spinks to differ only from a vault or grave, in

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being a temporary instead of a permanent resting place for the dead. It cannot, I think, with accuracy be said that the appropriation of a small portion of the churchyard for the use of the parish for such a purpose is an illegal diversion of the ground from parochial and ecclesiastical purposes to profane or secular purposes. In many churchyards there may be seen small erections for this purpose, and within the last twenty years, since the closing of the London churchyards for the purpose of ordinary burials, several Faculties have been granted from this Court for the erection of a mortuary for the use of the parishioners in their churchyard, and I can see no reason on principle for the Court departing from those precedents in cases where it is satisfied that it is essential for the health of the parish, that there should be a mortuary, and that the churchyard is a convenient site for it.

It was further argued for the defendants, that, assuming the Court to have jurisdiction to grant a Faculty for the erection of a mortuary in an ordinary churchyard, in this particular instance it was precluded by the terms of the 16 Geo. II. c. 28, a private act constituting the hamlet of Bethnal Green a separate parish of St. Philip's, Stepney.

In 1741, the date of the Act in question, it was necessary by the then state of the law to obtain an Act of Parliament to authorize the creation of a new parish, and for this purpose the Act referred to was passed. It contains, as might be expected, a provision relating to the churchyard, and provides that the piece of ground then set apart for and forming the present churchyard should be a cemetery or burial ground for the inhabitants of the said hamlet for ever, using the same terms as are

usually to be found in deeds of conveyance granting lands for the purposes of churchyards. This ground was subsequently consecrated, and thereby became subject to the jurisdiction of this Court, and the 42nd section of the Act, which provides that nothing therein contained "is intended or shall extend to invalidate any ecclesiastical law or constitution of the Church of England, or to destroy any of the rights or powers belonging to the Bishop of London and his successors, or any other local Ordinary, or to any archdeacon, chancellor, or official," and the 43rd section, which provides that "the Bishop of London and all other ecclesiastical Ordinaries and judges and their successors respectively, shall hereafter exercise ecclesiastical jurisdiction in the said new parish, as amply as they or any of them may now do in the said parish of Stepney" (the parish out of which this new parish is carved), in case that Act had not been made, would seem to contemplate that that churchyard was to be placed in the same position in reference to the jurisdiction of this Court as the churchyard of Stepney or any other parish.

Another objection taken was, that the position of the churchyard was unsuited for the purpose in consequence of its being situated at the west end instead of in the central part of the parish, and the inconvenience of access to it, and further (and to this a great portion of the evidence and argument was directed), that the mortuary would be a nuisance to the inhabitants of the houses near the churchyard and injurious to their health. It occurred to the Court that both these objections were entitled to the most serious consideration, and if it were satisfied that any other suitable site in the parish could at the present time on reasonable terms have been

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secured, it would have hesitated to grant the Faculty for a mortuary. It seems, however, that the erection of this mortuary was first mooted by the vestry in the year 1872, when its erection was strenuously resisted by Mr. Hansard, as the rector of the parish, supported by a considerable number of parishioners, on the ground of the inconvenience of the site, and the possibility of obtaining a more convenient site elsewhere in the parish. The vestry, in consequence of this opposition, abstained from pressing the matter at that time, and made application to the Poor Law Guardians, and to the Commissioners for Crown Lands for a site in the parish, but without success. They also inspected several sites which had been suggested as convenient for the purpose, and from an inspection of the sites myself, I am bound to say that I concur in the conclusion that the vestry came to, that these sites were objectionable. The Court has come to the conclusion, after due consideration of all the evidence that has been adduced before it, and of the able argument of counsel, that it is essential for the health of the parish that there should be a mortuary. It appears by the petition, paragraph 6, which is confirmed by the evidence, that the population of the parish consists of 120,000 persons, that many of them are exceedingly poor, that in some parts of the parish the population is most crowded, whole families having only one or at most two rooms to live in, that it is most important for the moral and for the sanitary welfare of the inhabitants that the bodies of persons dying in these crowded rooms should be removed at once to some convenient resting place, there to remain until they can be properly and decently interred; and it is to effect this purpose that the present application for a mortuary

has been made. The Court therefore has come to the conclusion, that it is essential for the health of the parish, from sanitary reasons, that there should be a mortuary, and after the inspection of the churchyard, and on consideration of the evidence, it has also come to the conclusion, that on the whole, notwithstanding its inconvenience, it is the most available and most suitable site for a mortuary.

To other portions of the application objections were urged, and as to having living rooms over the mortuary Dr. Tidy, a medical gentleman of great experience in such matters, and Mr. Bale, the medical officer of the parish, in answer to questions put to them by the Court, said at once that there were grave objections on sanitary grounds to having living rooms over the mortuary. There was a legal objection taken to the erection of rooms for holding coroner's inquests founded on the words of the 88th Canon. The wording of the canon runs in these terms:—"The churchwardens or questmen and their assistants shall suffer no plays, feasts, banquets, suppers, churchales, drinkings, temporal courts or leets, lay juries, musters, or any other profane usage to be kept in the church, chapel or churchyard, neither the bells to be rung superstitiously upon holidays or eves abrogated by the Book of Common Prayer or at any other times without good cause." Now, upon the wording of the canon, and upon the reasons upon which the provisions of the canon may be supported, I think that this objection is a valid one. For if a lay court is allowed to be held in a church or the churchyard, the control of the church or churchyard for the time being is necessarily taken from the Ordinary and placed in that of the judge or presiding officer of the lay court,

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and serious inconvenience or disturbance might arise by the holding of coroner's inquests in certain cases in a churchyard, more especially during divine service, without the Ordinary or his officers having any power to interfere or control the persons assembled there. The Court has therefore come to the conclusion that it ought to reject that part of the application for a licence to erect room for holding coroner's inquests and living rooms over the mortuary, and also that the site of the proposed mortuary is inconvenient and unnecessarily in too close proximity to the houses in Wood's Close, and particularly to those in Church Row; and as the surveyor stated in his evidence, that it might be with no great increase of expense, and without detriment to the rectory house, placed back, say fifty feet from the road on either side, the Court will be prepared to grant a Faculty for the erection of a mortuary in some such position with a post mortem room, which is incident and a convenient accessory to a mortuary.

In consequence of the Court having rejected a portion of the plan submitted to it, it will be convenient and desirable that the plan should be reconsidered; and the course I propose to take is, to adjourn the further hearing of this case in order that the plan may be reconsidered by the vestry, and I have no doubt that, with the assistance of their medical officer and their surveyor, they will be able to frame such a plan as would meet any practical objections that could be taken to it. I twice inspected the churchyard and the neighbourhood adjoining it, and it occurred to me that the distance of thirty-two feet between the houses in Church Row and the entrance to the mortuary (where bodies of persons who have died from infectious complaints were to be taken) is

objectionable ; and as the surveyor himself stated in his evidence, that by placing the mortuary a little farther back no inconvenience would arise to the rectory house, and no great increase of expense would be occasioned, I think it would be desirable for the parish to erect the mortuary farther from the road, and that the plan should be so framed that there should be means of increasing the size of the mortuary at a future time when occasion may require.

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The only remaining question which I had to consider is the question of costs. The costs are in the discretion of the Court, and in the present case Mr. Merceron and Mr. Wilson have, I am bound to say, succeeded on some very important issues, which were raised by the application of the rector and the churchwardens ; and, without meaning to throw any censure at all on the rector and churchwardens and upon the vestry, who have in this case done no more than they were bound to do, having due regard to the welfare of the parish, I think that Mr. Merceron is entitled to the costs which he has incurred on those issues in which he has been successful ; on the issue on which he has not been successful I do not think he is entitled to any costs. I order that the case stand over for a further hearing, and that Mr. Merceron have the just costs in the cause. It has for some time been the practice of the Court to name a sum for costs, but any difficulty that may arise on the question of costs may be referred to me in Chambers.

The case may stand over for further order.

The proctors for the Petitioners brought into the Registry an amended plan for the mortuary, showing the

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site on which, having regard to the decision of the Court, the petitioners proposed to erect the mortuary, and the Court thereupon decreed the Faculty to issue for the erection of the mortuary in accordance with such plan.

CONSISTORY COURT OF LONDON.

THE RECTOR AND CHURCHWARDENS OF ST. GEORGE'S,
HANOVER SQUARE

v.

HALL AND LORD GEORGE PAGET (a).

Mortuary—Detriment to Adjoining Property—Precautions on Removal of Bodies—Infectious Diseases—Rule as to Costs.

1879.
August 11.

The Rector and Churchwardens of St. George's, Hanover Square, petitioned for a Faculty to authorize the erection of a mortuary in the Old Parish Burial Ground, situate off Mount Street, which had been long closed for burials, on the ground that for the use of the civil parish, with a population of over 89,000, there was only one small mortuary, in which the bodies of persons who had died from infectious diseases were not received; and that in the result dead bodies necessarily remained in the houses of the poorer classes in the very rooms inhabited by members of the family until burial, and that no other convenient site in the parish was procurable for a mortuary.

(1) *Held*, That under the circumstances the duty of the Court was to grant the Faculty asked for.

(2) That the Court should not grant a Faculty to the detriment of private property, unless compelled to do so from necessity or a sense of duty.

(3) That before the removal of the bodies of persons who have died of infectious diseases to the mortuary, disinfectants should be placed in coffins, and the lids tightly fastened down.

(4) That bodies should be received into the mortuary only between the hours of 8.30 p.m. and 8.30 a.m.

(5) That the Respondents, being lessees of houses in the neighbourhood of the burial ground, that might be prejudiced by the erection of the mortuary, were entitled to their costs from the Petitioners.

(6) That in future, when an application is made for the erection of

(a) Reported L. R. 5 Prob. Div. 42.

a mortuary in a churchyard, the inhabitants of the neighbourhood may be represented by one counsel and one solicitor, at the cost of the Petitioner, with a view to direct the attention of the Court to any facts they may think advisable in the interest of the owners and occupiers of the adjoining property.

Dr. Spinks, Q.C., and *Brabant*, appeared for the Petitioners.

W. G. F. Phillimore for Mr. Hall.

Dr. Swabey for Lord George Paget.

Cur. adv. vult.

Dr. TRISTRAM.—This is an application for a Faculty to authorize the erection of a parochial mortuary, with a post mortem room attached, in the old burial ground of St. George's, Hanover Square, situate between Mount Street and South Street. The Petitioners are the Rector, and Mr. Hugh H. Seymour and the Duke of Westminster, the Churchwardens of the parish.

The Faculty is opposed by Mr. Hall, the lessee and occupier of one of the houses in Mount Street abutting on the burial ground, on behalf of himself and other lessees and inhabitants in the neighbourhood, and also by Lord George Paget, as lessee and occupier of a house and premises in Farm Street. The ground of opposition is not that the Court would be exceeding its jurisdiction in granting the Faculty, but that the site in question is unsuitable and inconvenient for the purpose, and that the erection of a mortuary there would be injurious to the health of the neighbourhood, as well as detrimental to the adjoining property.

The question of the jurisdiction of the Court to grant such a Faculty was argued at length and considered in the case of *Hansard v. The Parishioners of St. Matthew's, Bethnal Green* (*ante*, p. 74, and L. R. 4 Prob. Div. 46), in

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which I held that the appropriation for the use of the parishioners of a small portion of a churchyard as a temporary instead of a permanent resting place for the dead was not an illegal diversion of consecrated ground from ecclesiastical to secular purposes, and that as there were precedents for the granting of such Faculties, on the Court being satisfied that it is essential to the health of the parish that there should be a mortuary, and that the burial ground site was the most convenient and suitable of the available sites in the parish, the Faculty might properly issue.

The first question for the consideration of the Court is, whether the establishment of a parochial mortuary is desirable for the health of this parish. The evidence on this part of the case is as follows:—The population of the civil parish of St. George's, Hanover Square, in 1871, was 89,687; the boundary of the parish on the north is Oxford Street, on the east Regent Street and St. James' Street, on the west Hyde Park, and on the south Ranelagh sewer. The greater portion of its area is, of course, inhabited by persons in the higher grades of life, but there are numerous small streets, mews, and courts, even in the Grosvenor Square district, which contain a large population of the working classes, many of their families occupying two, and many even one room only. In the case of a death, therefore, whether from infectious or non-infectious disease in any such family, the body at present must remain until interment in the room where the other members are living and sleeping. Of this there were two recent instances in the Grosvenor Square district, given in evidence, one of a man who died in December last, leaving a widow and four children, and another of a man who died in April last, leaving a widow and six children, and in each of

these cases the families were in occupation of one room only, in which the corpse was obliged to be retained until burial. The medical officer of the parish (Dr. Corfield) stated that the want of a parochial mortuary to which bodies might be removed, either under the compulsory powers conferred upon him by the Sanitary Acts, or upon suggestion made by him, had lately been frequently made apparent in both infectious and non-infectious cases. The only places in the parish set apart for the reception of dead bodies are the dead house belonging to and adjoining the workhouse (a small and badly-ventilated building), which is for the exclusive use of the workhouse, and a small mortuary underneath St. Mark's Church, which is primarily for the inhabitants of the ecclesiastical parish of St. Mark's, and in which bodies that have died from infectious diseases are not received. So that at present the medical inspector of the parish is powerless to carry out the compulsory powers of the Sanitary Acts in this respect.

From the evidence in this and in previous cases, the Court has come to the conclusion that it is for the interests of all classes of society, for the higher as well as for the lower classes, that as far as practicable this danger should be prevented; and it is to be remembered that many of the working classes who have this limited accommodation are employed in making articles of clothing for the higher classes, and otherwise are brought in contact with the households of the higher classes. Thus, diseases may be communicated by contagion to any household.

The next question for consideration is whether the site proposed is the most convenient of the available

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ones in the parish. It was said it was not central. Undoubtedly, although it is in the centre of the Grosvenor Square district, it is not in the centre of the civil parish. But the only other available site is another parochial burial ground abutting on Albion Street, Hyde Park, which is in the extremity of the parish, and therefore more inconvenient.

Another objection is, that the mortuary will be detrimental to the house property abutting on the burial ground. This objection is entitled to very great consideration. This Court ought to be most reluctant to grant Faculties to the detriment of private property, and I should not do so unless compelled by a sense of necessity and duty. A mortuary, wherever established, will to a greater or lesser extent be a detriment to most residential properties, and it is this that places an almost insuperable bar in the way of vestries purchasing land in residential districts for parochial mortuaries. If the owner of any plot of land were not to object to sell himself, objection is sure to be taken by owners of adjoining properties, who, by bidding against the vestry or other means, will endeavour to prevent the vestry from becoming the purchaser. The result is that vestries are compelled to fall back upon their churchyards, and it appears to the Court that owners of property and residents in the neighbourhood of the London churchyards have less cause, if any, of complaint against the erection of mortuaries in the closed churchyards, provided due precautions are taken to prevent their being injurious to health or creating an unnecessary annoyance to the neighbourhood. The burial ground in question was set apart and consecrated as the sole churchyard of the parish in 1725, and burials were permitted to be made

in it without restrictions until 1825, when they were limited by Private Act of Parliament to families who had acquired rights of burial there. Such limited burials were allowed until 1855, when the ground by an Order in Council was closed for all burials. The houses in Mount Street, and the other houses abutting on the burial ground, were built some fifty or sixty years after its consecration and were therefore erected subject to any inconveniences which might arise from their proximity to a churchyard. The closing of the churchyard for all burials was a boon to the neighbourhood, and would, no doubt, have the effect of increasing to some extent the value of the leases of the adjoining houses, but it was not with the object of increasing the value of such houses that burials were prohibited there, but from sanitary reasons. Under such circumstances it appears to the Court more reasonable and equitable that mortuaries should, in residential parishes, be erected in the closed churchyards rather than be forced on the owners of property and inhabitants of other parts of the parish. But, as in the present case, the leases of the adjoining houses will fall in during the next six or eight years, any depreciation of the value of the property which may be occasioned by the issue of the Faculty asked for, will fall principally upon the Duke of Westminster, as the ground landlord, who is one of the petitioners for the mortuary.

A further and more serious objection, if it could be established, is, that the establishment of the mortuary will be injurious to the health of the neighbourhood. Upon this point Dr. Tidy, Professor of Chemistry and Forensic Medicine in the London Hospital, and Medical Officer of Health for Middlesex, and Dr. Corfield gave

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very important evidence. The result of their evidence may be thus stated: Infectious complaints are liable to be transmitted both by infection and contagion, but the moment vitality is gone from a body the danger of transmitting disease by infection ceases, and the danger of transmitting it by contagion, *i.e.*, through persons coming in contact with the dead body or infected articles, is the sole remaining risk. The certain safeguard against this danger is the placing of disinfectants in the coffin and fastening the lid tightly down before removal from the house.

There is vested in this Court a discretion as to the terms or conditions upon which it will issue such a Faculty for a mortuary, and it seems to me that the inhabitants of a neighbourhood in which it is proposed to establish it may fairly ask the Court not to issue such a Faculty without inserting in the grant such conditions as shall prevent its establishment from becoming injurious to their health, or an annoyance to them such as may without public inconvenience be prevented.

Since the hearing of the case I have inspected the burial ground and neighbourhood, and I have come to the conclusion that the Faculty should issue for the erection of the mortuary on the site proposed, but that the petitioners shall have power to excavate for its foundation, and for that purpose to remove and reinter bodies buried on the site, so as to make it less conspicuous to the houses adjoining, and that the tombstones on the site should be placed in an erect position against the walls of the burial ground.

The Court will also order that the Faculty contain a proviso, that before the removal of a body which has died from infectious disease from the house to a mortuary

disinfectants shall be placed in the coffin and the lid screwed down, a provision which the medical officer of the parish has power to enforce.

As it would be extremely inconvenient, and in my judgment would press with unnecessary hardship on the inhabitants of some of the houses, if bodies were allowed to be brought to the mortuary at all hours of the day, including business hours, when Mount Street is most crowded, the Court will insert a further proviso that bodies shall not be received between the hours of 8.30 in the morning and 8.30 at night, and by these precautions it trusts that it will have, as far as is practicable, removed the objections taken to the establishment of the mortuary.

There only remains the question of costs. I think the costs incurred by Mr. Hall and by Lord George Paget have been reasonably incurred, and that they may be treated as costs incidental to the obtaining of the Faculty, and ought to be paid by the Vestry.

In future cases, where an application is made for a mortuary, I think that the inhabitants of a neighbourhood ought to be represented by a solicitor and counsel at the cost of the applicants for a Faculty, with a view to bring to the attention of the Court any facts which they may think it desirable in the interests of the owners and occupiers of the adjoining property.

The Faculty will issue upon the above terms for the mortuary with the post mortem room as incident to the mortuary, the access to the mortuary to be by the present access to the burial ground (a).

(a) The Duke of Westminster subsequently presented the Vestry with a site for a mortuary in substitution for the site granted by this Faculty.

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CONSISTORY COURT OF LONDON.

THE VICAR OF ST. SEPULCHRE

v.

THE CHURCHWARDENS OF ST. SEPULCHRE (a).

Faculty to Churchwardens—Separate Churchwardens—Trustees of Fund for Repairs of Church—Practice.

1879.
August 9.

The parish of St. Sepulchre is situate partly in the City of London, and partly in the County of Middlesex, with one church and five churchwardens. Three of the churchwardens are elected by the Vestry for the portion of the parish in the City, and two by the Vestry for the portion of the parish in Middlesex. They meet in separate vestries, but make a joint presentment at visitations, and are jointly admitted at visitations as churchwardens for the whole parish. The City churchwardens have the distribution of the only parochial fund, of which they are sole trustees, set apart for the maintenance and repairs of the church, and had been accustomed to appropriate it for such purposes without the intervention of the Middlesex churchwardens. A Faculty issued on the 20th of March, 1878, on the petition of the Vicar and the five Churchwardens, authorizing the Petitioners to restore the church according to a plan filed; and the City churchwardens, as furnishing the funds for the restoration, subsequently refused to allow the Middlesex churchwardens to interfere with the works. A further Faculty was required to authorize other works not authorized by the previous Faculty, and the Vicar and City Churchwardens petitioned for such Faculty to be granted them. The Middlesex Churchwardens entered an appearance to the citation, and applied that they should be joined in the Faculty. An agreement was come to between the parties as to the form of the further Faculty.

(1) *Held*, That the churchwardens from the two portions of the parish were equally officers of the Ordinary in relation to the affairs of the parish, and that the Faculty ought to issue to them jointly as churchwardens, and to the City churchwardens as trustees of the restoration fund.

(2) That for convenience the practice is to join with the church-

(a) Reported L. R. 5 Prob. Div. 64.

wardens in a Faculty for the restoration of a church any person who may contribute or make himself responsible for the whole of the expenses of the restoration, and for him to sign the contract for the works.

(3) That a proviso ought to be added to the Faculty, that the City churchwardens be not interfered with by the Middlesex churchwardens in regard to carrying on the works, with liberty to the Middlesex churchwardens to make a further application to the Court, should the City churchwardens deviate from the provisions of the Faculty.

(4) That the judge of the Consistory Court sits as representative of the bishop of the diocese, and that where there is a fair and honest difference of opinion as to what alterations should be made in a parish church amongst the parishioners, either party is entitled to take the opinion of the Bishop's Court on the subject without being liable to condemnation in costs.

(5) That in the present case the costs of the Middlesex churchwardens might be properly paid out of the fund of which the City churchwardens were trustees.

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Dr. Deane, Q.C., and *W. G. F. Phillimore*, for the Petitioners, argued that the Faculty ought to issue to them alone.

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A. J. Stephens, Q.C., and *Sutton*, for the Middlesex Churchwardens, contended that the Faculty ought to issue to both sets of churchwardens jointly, and subject to the terms of arrangement in regard to the restorations.

Cur. adv. vult.

Dr. TRISTRAM.—The Petitioners in this case are the Vicar of the Parish of St. Sepulchre (which is situated partly within the City of London and partly in the county of Middlesex) and the three Churchwardens elected by the Vestry for the City portion of the parish. They ask for a further, or supplemental Faculty, to authorize them and their successors to make certain

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alterations and to do certain restorations in their parish church not authorized by a previous Faculty issued in April, 1878.

The Defendants are the two Churchwardens elected by the Middlesex portion of the parish, who objected to some of the proposed alterations, and claimed to be joined in any Faculty that the Court might issue.

The case has been on several occasions before the Court during the last nine months, and in order to explain the nature of the questions now to be determined, and some of the grounds upon which the Court bases its decision, it will be necessary to refer briefly to the history of the parish and of the parish church, as proved in evidence, and to the proceedings which have led immediately to the present litigation.

The larger portion of the parish lies within the City of London, and the smaller portion is in the county of Middlesex. Each division from the earliest times has had a separate vestry and separate churchwardens, elected by their respective vestries. The churchwardens for the two divisions appear to have been five in number. In 1664, four were elected for that portion of the parish within the Liberty of the City, and one for that part without the City. In the following century the City division appear to have elected three, and the Middlesex division two churchwardens.

For the two divisions of the parish there has been from early times only one place of divine worship, St. Sepulchre's Church, situate on Snow Hill, in the City portion of the parish. It is a large edifice remarkable for its architectural beauty. It was seriously damaged in the Great Fire of London, and was restored (whether under the superintendence of Sir C. Wren or not does not appear),

according to the parochial records and to a print of 1734, as a Gothic building, the interior of the nave having a classical arcade and ceiling. Subsequently, in 1796, a crack was discovered in the western tower, and classic sub-arches were placed underneath the fine Gothic arches which supported the tower, and certain other external alterations were made in the church, a deviation from the plan on which it was restored after the Fire of London, substituting classic for Gothic decorations in certain portions of the external part of the building.

The fabric of the church has been maintained in repair, and the expenses attending divine service have been provided for from the income of certain property situate within the City portion of the parish devised for that purpose, amongst others, by William of Newcastle, by his will dated 1338, to the vicar and four parishioners, wardens of the church of St. Sepulchre. As a matter of fact, this property has for a very great length of time been under the sole control of the vicar and City church-wardens, and in all acts relating to it they have been treated as the sole devisees in trust of the same. From the parochial records, it would seem that the City church-wardens, having the control of this fund, have taken frequently the exclusive, and always the principal part, in matters relating to the repairs and management of the church. On certain occasions the Middlesex church-wardens and Vestry have been consulted by the City Vestry on such matters, and in particular as to the restoration of the church after the Great Fire of London.

In 1833 it was proposed to do extensive works in the church, and to raise a fund for that purpose, and the City officers having by letter proposed to have a conference with the Middlesex officers, they received the

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following answer from the vestry clerk of the Middlesex Vestry :—

“ Saint Sepulchre, Middlesex Vestry Room,
“ 5th Aug., 1833.

“ At a meeting of the parishioners, convened to take into consideration a letter received from the vestry clerk of St. Sepulchre's, London, relating to the repairs of the church. The letter being read and the subject discussed, and it appearing to the meeting that the parish of St. Sepulchre's, London, have considerable estates, the rents of which are solely applicable to keeping the parish church in repair, and this meeting being informed that there is no instance on record of the parish of St. Sepulchre, Middlesex, having contributed to the repair of the church, or of being at all consulted on any subject connected with the management of the church, a motion was made, seconded, and put, that the churchwardens and overseers be requested not to attend the meeting, or at all interfere with the repairs of the church. Carried.—ROBINSON & HINE, vestry clerks.—Carried by order.”

In 1836, on the City Vestry proposing that there should be a subscription in both divisions of the parish to effect certain repairs in the church, they applied to the Middlesex Vestry for their co-operation, who thereupon raised a sum by subscription for this purpose in their part of the parish.

It appears, also, that a Faculty issued from this Court, dated the 9th of October, 1860, to the vicar and City churchwardens only, authorizing the erection of a parochial school on a portion of the parish churchyard.

In February, 1878, a petition, signed by the vicar and the three City and two Middlesex churchwardens, was presented to the Court, praying that a Faculty should issue to the petitioners to enable them and their successors to restore the church, according to a plan filed, at the

cost of 4,500*l.*, which sum was to be provided out of the Newcastle fund. The Petitioners appeared by proctor, and the citation reciting the petition having been issued in April, 1878, the Court issued a Faculty in accordance with the prayer of the petition; but inasmuch as the names of the churchwardens were not inserted in the Faculty, it was contended, on the part of the City churchwardens, that the Faculty in terms had issued to them to the exclusion of the Middlesex churchwardens. There does appear to be some ambiguity in the wording of the Faculty on this point; but it is contrary to the practice of the Court to exclude any of the petitioners for a Faculty from the grant without notice to them, and it was certainly not the intention of the Court to do so in the present instance; and I repeat what I said on a previous occasion, that the ambiguity (if any) on the face of the Faculty is cured by reference to the petition and citation, and I therefore hold that the Middlesex churchwardens are to be taken as parties to whom the Faculty was granted.

The City churchwardens, however, carried on the works contemplated independently of the Middlesex churchwardens, and during their progress it became necessary to take down the whole instead of a part of the galleries, and on sanitary grounds to remove certain coffins, which were immediately under the floor of the church, and to lower the flooring; and on removing the sub-arches under the tower the old crack was discovered in the tower. These further works having been commenced without the authority of a Faculty, the Middlesex churchwardens applied to the Court to restrain the City churchwardens from departing from the Faculty, and for an order that they should act conjointly with

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them in carrying out the works. The vicar and City churchwardens thereupon filed the present petition, and to this petition the Middlesex churchwardens filed an answer acquiescing in some, but objecting to others, of the proposed works; and after hearing evidence and counsel on the question, the Court suggested that, as the differences between the vestries were not of serious import, they might, after conferring together, agree upon a plan which would meet with the approval of the Court, and for that purpose the further hearing of the case was adjourned.

A plan was agreed upon and embodied in a memorandum in writing, and approved of by the Court, and an order was issued sanctioning the further restoration proposed in this plan.

In the memorandum three questions were reserved for the consideration of the Court, viz., first, whether the Faculty should issue to the Middlesex as well as to the City churchwardens; secondly, whether the Middlesex churchwardens were entitled to take any, and if any, what part in the management of the church; and thirdly, as to costs.

It was argued by counsel for the Middlesex churchwardens that the five churchwardens formed one corporation, and that the Faculty ought to go to them in their corporate capacity, and not to certain members of the corporation. It was urged on the other side that there are recent instances in practice of Faculties going to one churchwarden (see *Bradford v. Fry*, Law Reports, 4 Prob. & Div. p. 93), and that as the Middlesex churchwardens had heretofore taken no active part in the management of the church affairs, they ought to be excluded from the grant.

The office of churchwarden is an ancient parochial office recognized by our Common as well as by our Ecclesiastical Law, and by the first Act for the relief of the poor, 43 Eliz. c. 2, the churchwarden is *ex virtute officii* an overseer of the poor of the parish. They are also officers of the Ordinary, and it does not appear to the Court that the churchwardens of a division of a parish can be deprived of their official character or position by the circumstances of a private individual having left a fund to the churchwardens of another division of the parish sufficient for the repairs and expenses of the church, or by any disclaimer or neglect on the part of the churchwardens or vestry of such division.

In the present case, moreover, all the five churchwardens have from early times been invariably admitted and sworn in as churchwardens of the parish, and have jointly in such capacity made presentments at the visitations relating to the church and church furniture. I am therefore of opinion, that the Court would not be justified in excluding the Middlesex churchwardens from the grant of the Faculty, if they are desirous of being joined in it with the City churchwardens.

The decision of the King's Bench in *The King v. Marsh*, 5 Ad. & Ellis, 468, is in accordance with this conclusion. In that case the parish of Berkeley, in Gloucestershire, was divided into four tithings—Berkeley Town, Alkington, Ham, and Hinton. An inhabitant of each tithing was chosen as one of the churchwardens, at a vestry held at Easter for the whole parish, by the inhabitants of the tithing. There was one church in the parish, and a chapel of ease in Ham. Each of the tithings had separate poor rates, and managed its poor

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separately. The four churchwardens were sworn in together at the archdeacon's visitation faithfully to execute the office of churchwarden within their parish, and to present such things as were presentable, and none of the churchwardens acted out of his own tithing except in signing the general presentments. In ascertaining the boundaries between certain parts of the parish of Berkeley and an adjoining parish, it was necessary that certain notices should be given to one of the churchwardens or overseers of the poor of the respective parishes, omitting entirely any mention of the officers of districts, and a notice respecting certain lands in the tithing of Alkington had been served on the churchwarden elected by the tithing of Berkeley Town, and the question was whether this was a good service. The King's Bench held that this was a good service, and Lord Denman, in delivering the judgment of the Court, laid down the following propositions in reference to churchwardens:—

“Generally speaking, the churchwarden is peculiarly and emphatically a *parish* officer. The nomination may be (not unusually is) by a portion of, or even by a person in, the parish; but the office is not thereby affected. He is still of, and for, the parish. We think that this may be considered as a somewhat unusual case, of separate appointment, and separate acting, without affecting the proper and legal character of churchwarden. It may have been an arrangement for some purpose of real or supposed convenience. They are sworn *as for the parish*; the acts before particularly alluded to *are for the parish*; the general and undoubted character of the office is *for the parish*.” It would, however, be inconvenient to confer power by the Faculty on persons who are not

trustees of the repair fund, to interfere actively with the works or contract.

As a matter of fact the only fund disposable for the costs of the restoration is at present vested in the City churchwardens; and they are the persons who would have to sign the contract for the works. The Middlesex churchwardens say they are equally trustees of the fund. The question who are the proper trustees is a question for the determination of the Chancery Division of the High Court of Justice, and not of this Court.

The Court, therefore, proposes to issue the Faculty to the City and Middlesex churchwardens in their capacity of churchwardens of the parish, and to the City churchwardens in their additional character as present trustees of the Newcastle fund, and to other the trustees for the time being of this fund, with a proviso that the trustees shall not be interfered with by the Middlesex churchwardens in regard to carrying on the works, unless the Middlesex churchwardens shall be declared by a competent Court to be also trustees of the fund. If the City churchwardens deviate from the Faculty the Middlesex churchwardens can apply to the Court on the subject. It is convenient, where the funds for carrying on the works are not in the hands of the churchwardens, that the person who furnishes the funds and signs the contracts should be joined with the churchwardens in a Faculty for restoring or repairing a church. This is done where a layman undertakes at his own cost to restore or rebuild his parish church. As to the second question, the Court is of opinion that the Middlesex churchwardens are, equally with the City churchwardens, officers of the Ordinary in all matters relating to the management of their parish church, and are entitled to a

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voice in the same. As to the remaining question of costs, it is to be borne in mind that the question whether a Faculty shall issue for the restoration of, or any particular alterations in, a church is in the discretion of the Court, and that whether there is or is not a division of opinion in the vestry on the subject, it is for the Court to determine as to the terms in which it shall issue. It is also to be borne in mind that the judge of a Consistory Court is the representative of the bishop of the diocese, and it seems only reasonable that when there is a fair and honest difference of opinion as to what alterations shall be made in a parish church amongst the parishioners as in the present case, it should be open to either party to take the opinion of the Bishop's Court on the subject without being called upon to pay the costs of the opposite party. Very nice and difficult questions have been raised in this case, in a great measure owing to the acts of previous vestries, and to the manner in which their records have been kept; and on this ground I may follow Dr. Lushington's ruling in a similar case—that of *Braithwaite v. The Dean of Chichester*, and leave each party to pay their own costs. There may, however, be a parochial fund, out of which the costs may be properly payable; and if a certificate from this Court, that the costs incurred by both parties in the applications made in this case may fairly be charged on such fund, would be of service to either party, the Court is prepared to give such certificate.

The Court will also order that the costs of both parties be paid out of any parochial fund, in respect of which it may have jurisdiction to make such order.

CONSISTORY COURT OF LONDON.

THE RECTOR AND CHURCHWARDENS OF ST. STEPHEN,
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v.

THE TRUSTEES OF THE SUN FIRE OFFICE.

Wrongful Demolition of a Churchyard Wall—Duty of Churchwardens to Rebuild same—Faculty—Payment for Access of Light and Air from Churchyard to Rector—Jurisdiction of Court—Principles of Assessment of Amount of Payment.

A contractor when rebuilding a house abutting on a churchyard unlawfully pulled down the churchyard wall for the purpose of obtaining for the lower windows of the house light and air from the churchyard, and rebuilt the house a few inches from the site of the old wall, and outside the churchyard. The Rector and Churchwardens, in order to vindicate their right to rebuild the wall, placed an iron screen of the same height as the old wall immediately opposite to the windows of the new house. On an application by the Rector and Churchwardens for a Faculty to rebuild the wall,

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(1) *Held*, That where a churchyard wall has been wilfully pulled down, or fallen down, it is the duty of the churchwardens to rebuild it, and if they do so without alteration no Faculty is necessary, unless their right to rebuild it is in dispute.

(2) That when the owners of a house abutting on a churchyard desire to secure additional light and air to the windows of the house from the churchyard, they may secure it by a Faculty, subject to the payment of an annual sum.

(3) That in assessing the annual sum to be paid, the Court should make deductions from the estimated increased value of the house by reason of the additional light and air for repairs, rates and taxes, non-letting and enterprise, and in the present case also for the costs of the suit ordered to be paid by the Respondents.

Faculty decreed, authorizing the Churchwardens to erect railings where the old wall stood, and securing to the owners of the premises light and air from the churchyard to the lower windows, subject to an annual payment of 25*l.* to the Rector.

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Cozens-Hardy, Q.C., and *Phillimore*, for the Petitioners,
the Rector and Churchwardens.

Giffard, Q.C., and *Jeune*, for the Respondents.

The material facts proved in evidence are embodied
in the judgment.

Cur. adv. vult.

Dr. TRISTRAM.—Questions of Ecclesiastical Law were raised in this case of novelty, of some nicety, and of considerable importance, especially in the City of London, and the Court has therefore taken time to consider its judgment.

The Petitioners ask the Court to grant a Faculty authorizing them to rebuild a portion of the wall of the churchyard of St. Stephen, Walbrook (which was in 1876, without their sanction, illegally pulled down by a contractor), on its former site, and to its former height, $13\frac{1}{2}$ feet above the level of the churchyard, or to make such other order in the premises as the Court may think just.

The Respondents appear, as owners of a house, No. 37, Walbrook, abutting on the site where the wall in question formerly stood, and object to its being rebuilt, on the ground that its restoration would deprive some of the windows of their house of access of light and air.

The churchyard is surrounded on one side by the church, and on the second side, in part, by No. 37, Walbrook, and on the other part by premises belonging to Messrs. Rothschild, and on the two other sides by other houses. It was formerly surrounded on these three sides by a high wall. Some twenty years ago the owners of the adjoining houses, excepting the owners of No. 37, Wal-

brook, by arrangement with the rector and churchwardens, and with the approval of the vestry, subject to annual payments to the rector, utilised the churchyard wall by making it a main wall for their premises, constructing windows in it.

In 1875, the then owners of No. 37, Walbrook, commenced to rebuild their premises, and their contractor by the works endangered the foundations of the church and churchyard wall, which led to an application by the rector to the Chancery Division for an injunction against the contractor. This suit was abandoned on terms favourable to the rector, and subsequently an agreement was entered into between the rector and churchwardens and the then owners to allow them to rebuild the south wall of their premises on the site of the old churchyard wall, with access of light and air to the lower windows from the churchyard, together with a private right of way across the churchyard, for the term of eighty years, subject to the payment of a rental to the rector of 300*l.* a year, and to other conditions. This arrangement was approved of by Earl Cairns, as Lord Chancellor, the Crown being alternate patron of the living, and by the Ecclesiastical Commissioners, and on January 9th, 1878, by a Faculty of this Court. The contractor, instead of erecting the south wall of the new house on the site of the old churchyard wall, erected it 16 inches from such site, on the freehold of the owners, thus depriving the rector and churchwardens as well as this Court of all control over it, which resulted in the abandonment of the agreement. The trustees of the Sun Fire Office, before the abandonment of the agreement, became mortgagees of the premises, and, without having had notice of the agreement, advanced a portion of the

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mortgage-money. They have since by foreclosure become the owners. The rector and churchwardens, after the Sun Fire Office had become owners, expressed their willingness to assent to their retaining the access of light and air to their premises, provided the office would agree to make an annual payment for the same. The Sun Fire Office having declined to agree to make any payment, the rector and churchwardens, on the 27th of August, 1881, with a view to vindicate their rights, placed an iron screen on the site of the old churchyard wall of the same height as the former wall, thereby obstructing the free access of light and air to the lower windows of No. 37, Walbrook. The Sun Fire Office caused this screen to be removed, and then made an application to me in Chambers to issue a monition prohibiting the rector and churchwardens from further obstructing the light and air to these windows. In the first instance, it was arranged that the questions raised should be argued on a special case. Dr. Phillimore, however, as counsel for the rector and churchwardens, advised that there were objections to this course, and that the questions might be more conveniently raised by the rector and churchwardens petitioning for a Faculty to authorize the restoration of the wall.

On the facts proved five questions of law arise, which more or less will affect the decision of the Court.

The first question relates to the rights of the rector over the churchyard. In *Walter v. Montague and Lamprell* (1 Curteis, 260), Dr. Lushington says, "It is clear that by the common law the rector has the freehold in the churchyard, qualified undoubtedly by the rights of the parishioners, but subject thereto he may bring an action for trespass." His right to the freehold carries with it

generally the right to all profits lawfully arising therefrom, for example, the right to the herbage, to fees for the erection and opening of vaults, for the erection of tombstones, and for burials in common graves. It is stated, in 1st Shower, that in London the churchwardens, by custom, are entitled to the fees arising from the churchyard. This is not, however, by any means an universal custom in the city or diocese. In St. Andrew's, Holborn, the rector and churchwardens, as appears in the judgment of Lord Stowell in *Gilbert v. Buzzard* (2 Haggard's Consistory Reports, 365), divided the fees in respect of which his Lordship says the freehold of the soil is in the incumbent, though provided originally by the parishioners. Parishes by acquiescence, confirmed by usage, have acquired concurrent rights with the incumbent. This is a matter on which the judges of this Court have judicial cognizance, as one of their duties from early times has been to sanction the scale of fees to be charged in churches and churchyards, and in a case in the city which some time since came under my official notice I found that the rector was entitled to receive the fees arising from the churchyard. During the hearing of this case, I inquired what was the custom in this particular parish in respect of fees, and the counsel for the respondents at once admitted, that if any money was payable in respect of access of light or air to the churchyard, the rector was entitled to it.

The second question relates to the rights and duties of the churchwardens in respect of the churchyard walls. It is clear from the authorities, that one of their official duties is to take care that the churchyard is properly walled in or fenced, and that the accustomed churchyard wall is kept up in proper repair. Canon 86 is as

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follows:—"The churchwardens or questmen shall take care that the churchyard be well and sufficiently repaired, fenced, and maintained with walls, rails, or pales as have been at each place accustomed at their charges with whom by law the same appertaineth." And Lord Coke, in his Institutes, assigns two reasons for their being kept properly enclosed; first, for the preservation of the graves and monuments of the dead buried there; and, secondly, for the protection of the church (2 Coke's Institutes, 489). Dr. Lushington, in *Walter v. Montague* (1 Curteis, 260), further says, "The churchwardens by virtue of their office are bound to see that the footpaths in the churchyard are kept in proper order, and the fences in repair." I take it also to be law, that the churchwardens are liable to be articulated in the Ecclesiastical Court and to censure for neglecting this duty, and that it would be no answer to the suit, that they had not funds in hand for the purpose, provided they were in a position by law to obtain them, or that there had been a vote of the vestry prohibiting the rebuilding or repairing of the wall (*Millar v. Simes, & Kilby & Palmer*, 2 Curteis, 546). If the accustomed churchyard wall has fallen, or been wilfully pulled down, their duty is to restore it, and for this no Faculty is required.

The third question relates to the rights of the vestry over the churchyard. The vestry is entitled to be consulted, and its opinion to have weight with the Court, wherever the rights of the parishioners are affected. In the present case, a meeting of the vestry was held, and a vote was passed adverse to this application. It appears, however, that the vestry was influenced in their decision partly from a desire to save the parish legal expense, and partly owing to representations made

to it, which were inaccurate, as to the respective positions of the rector and churchwardens, and the trustees of the Sun Fire Office in the dispute. The objection of expense is met by the Grocers' Company, the alternate patrons of the living, having undertaken to bear the churchwardens' costs of this suit. Moreover, the churchwardens cannot be estopped by a vote of vestry from restoring a churchyard wall, which has been illegally taken down.

The fourth question relates to the rights of the respondents. They are in no way to blame for the demolition of the wall. They advanced a considerable portion of the mortgage money before they had notice of the claim asserted by the rector and churchwardens. Their ignorance of this claim at the date of the mortgage will not, however, entitle them to ignore it. They stand in the shoes of the mortgagor, who could confer on them no better title than he himself had. If the mortgagor could not dispute the right of the parishioners to rebuild the wall, no more could the Sun Fire Office, as his mortgagees.

The fifth question relates to the extent and nature of the jurisdiction of the Court in the matter. Its jurisdiction is recognized by the statute "*Circumspecte Agatis*," 13 Edw. I. statute 3, cap. 1, and by numerous decisions in the Courts of Common Law and of Equity. Dr. Lushington, sitting in this Court in *Walter v. Montague*, already cited, which was a suit brought by a rector against churchwardens for having illegally pulled down a churchyard wall, says: "The churchyard being consecrated ground this Court has cognizance of the matter, and it is my duty to protect it against any unauthorized or illegal invasion whatever." (See also *Marriott v.*

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Tarpley, 9 Simons; 1 Ventris, 127; *Anonymous*, and *Quilter v. Newton*, Carthew, 151.)

If the contractor had been proceeded against in this Court for pulling down the wall, its duty would have been to make an order against him to restore it as it formerly stood, and to have condemned him in the costs of the suit. It would also have been open to the churchwardens to have restored it without applying for a Faculty. For a Faculty is only required for an alteration or addition to a church, or for an alteration in a churchyard, and not for restoring a portion of a church or a churchyard wall which has fallen or been wilfully pulled down, where there is no material alteration or addition made to the church or churchyard wall as restored. In the registry there are no precedents, that I can discover, of a Faculty having been granted simply to restore a churchyard wall that has fallen down. But there are cases within my own experience of Faculties granted to rebuild a churchyard wall where alterations are proposed to be made in it, such as substituting a railing for the upper part of the wall, or the making of an additional entrance gate in the wall. Had the churchwardens rebuilt this wall, the Court would not have been justified in ordering its removal. But the Trustees of the Sun Fire Office having given them notice of their intention to contest their right to rebuild it, they very properly invoked the aid of the Court to authorize their doing so.

The present state of the churchyard wall is as follows:—The churchyard is surrounded on three sides, excepting the portion abutting on 37, Walbrook, by walls standing on the churchyard, and therefore under the control of the Court. These walls form the main

walls of one side of the houses abutting on the churchyard. The portion of the churchyard on which No. 37, Walbrook abuts is separated from the street only by the house itself, and there being no wall or fence to separate the house from the churchyard, there is direct access from it into the churchyard and church. Such a state of things ought not to be permitted to continue. It seems to the Court that the following would be a fair settlement of the questions in dispute, that the Trustees of the Sun Fire Office should agree to make an annual payment to the rector with a view to secure undisturbed access of light and air to the lower windows of their premises from the churchyard; that the churchwardens should erect such a railing on the boundary of the churchyard as will not interfere with this access of light and air; and that the amount of the annual payment to the rector be settled by mutual agreement, or by the Court or referees, and be sanctioned by a Faculty. The payment of an annual sum to a rector or a vicar in such a case was sanctioned by Dr. Lushington under a Faculty granted by this Court in 1831, securing, in consideration of an annual payment, to the General Post Office light and air to some of their windows from the adjoining churchyard.

The Court is always reluctant to make any order which may have the effect of depriving houses abutting on churchyards *of light and air* hitherto enjoyed by them; and I should not in this case be prepared to sanction the erection of a new wall of greater height than the old one to the disadvantage of the new premises in these respects.

On the question of costs I should say that the churchwardens were fully justified in bringing this suit, and having succeeded in it, they are entitled to their costs;

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but as the questions raised were of first impression, in fixing the rent to be paid by the trustees, the fact that they have borne the costs of this suit is entitled to consideration. The annual sum to be paid can either be fixed by agreement between the parties or by the Court, or by a referee or referees selected by the parties. The Faculty will not issue until the parties have decided on the course they propose to adopt, whether to appeal or to agree upon a sum, or to accept the decision of the Court on the amount of the annual payments, or that of a referee or referees, and if so, until the annual amount to be paid has been fixed either by agreement or in one of the other modes I have pointed out.

An Appeal was asserted on behalf of

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April 27.

W. G. F. Phillimore, for the Petitioners, elected that the amount of rent to be paid to the rector should be determined by the Court.

Jeune, for the Trustees of the Sun Fire Office, assented to this course, and abandoned their Appeal.

The Court ordered that the evidence in reference to the amount of rent should be taken by affidavit.

August 8.

Phillimore, for the Petitioners, argued the question as to the amount of rent.

Jeune for the Trustees.

Cur. adv. vult.

Dr. TRISTRAM.—In this case a portion of the churchyard wall of St. Stephen, Walbrook, had been removed in 1875 by the former owners of 37, Walbrook, without the knowledge of the rector and churchwardens of the parish, with a view to acquire from the churchyard access of light and air for eight windows of the house then in process of re-erection. The Court has decided that its removal was unlawful, and that the petitioners, who are the rector and churchwardens, were entitled to a Faculty authorizing its restoration; but as such restoration would in a great measure deprive these windows of light and air, the petitioners have consented to waive their strict right to its restoration upon the defendants, as owners of the property, undertaking to make to the rector of the parish such annual payments as under the circumstances may be deemed reasonable, and the parties have arranged to leave it to this Court to determine what such payment should be.

At the hearing of the cause some evidence was given of the additional value accruing to the premises from this access of light and air, but not sufficient to enable me to determine the question. The petitioners and defendants have therefore since the hearing produced further affidavits on this point, each filing affidavits from three architects, and from one surveyor. One of the petitioners' witnesses estimates the increase of value from this light and air to the house at 80%, another at 77%, and the remaining two at 60% per annum. The witnesses for the defendants do not deal in detail with the question of increase of value; but one of them says that the premises at the cost of 150% might be so altered as not to be materially injured by the restoration of the wall, but this is contradicted by the petitioners' affidavits

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in reply. Two of them give it as their opinion that a payment of 4*l.*, and the remaining two that a payment of 5*l.* per annum, should satisfy the just claims of the rector. But their estimate rests on the assumption that he is only entitled to a nominal or acknowledgment rent, whereas the Court has already decided that he is entitled to a reasonable or substantial rent.

It now remains for the Court to determine, upon the materials before it, upon what other basis the payment should be assessed.

It was contended by Mr. Jeune for the defendants, that it ought to be assessed upon the principle laid down by the Queen's Bench Division in *Stebbing v. The Metropolitan Board of Works* (L. R. 6 Q. B. 37), in which it was held that the rector of three City churchyards taken by the Metropolitan Board of Works under the Metropolis Improvement Act, 1863, for the purpose of making the new street from Blackfriars to the Mansion House, was only entitled to compensation for the loss he sustained by being deprived of his rights in the churchyard, and not with reference to the value of the ground to the Metropolitan Board of Works. But this decision was based upon the special provisions of the statute taken in combination, in the opinion of some of the judges, with the fact that the land was required for public purposes; and Lord Chief Justice Cockburn in his judgment remarked, "that if a railway or commercial company had
" been about to acquire these churchyards, the legislature
" might well have required their value to be assessed not
" with reference to the rector's pecuniary interest in them,
" but in reference to their value to the company taking
" them."

In the present case the right to access of light and air,

if retained, will have been acquired by favour of the rector to the advantage of owners of private property, and not, as in the case cited, under the compulsory powers of an Act of Parliament, and for public purposes; and I therefore hold that the principle of compensation laid down in that case ought not to influence me in making my award.

Mr. Jeune further contended, that as the rector could not use this light and air for himself beneficially, and as it was not a commodity which could be competed for in the market, it being of no value to anyone except to the owners of 37, Walbrook, the owners were taking from the rector nothing of real value to him, and that therefore no substantial payment should be awarded to him.

If the owners could show that by statute or custom they were entitled to the user of such light and air from the churchyard on compensating the rector for any loss he might sustain by the exercise of such right, this argument ought to prevail. But they are not in such position. They can only secure the user by the voluntary concession of the petitioners, or on the petitioners' own terms.

I think the rector is entitled to a substantial and not to a nominal payment for this concession. On this point the authorities and precedents are not silent. Thus, in the case already referred to, Lord Chief Justice Cockburn observed, that in a case such as the present one the Legislature might very reasonably require the compensation to be assessed in reference to the value of the property. The Ecclesiastical Commissioners and Earl Cairns, as Lord Chancellor, in the case of this very churchyard, sanctioned a scheme by which, (if it had been carried out,) the former owners of

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the property were to pay to the rector 300*l.* a year for the concession of light and a right of way across the churchyard. There are also instances in which this Court has, in recent times, in consideration of a substantial payment, sanctioned by Faculty the concessions of private rights of way and user of lights in churchyards. If the payment is to be a substantial and not a nominal one, the Court cannot accept the sum named by the defendants' witnesses as adequate. The only remaining evidence on the question of value is that given by the petitioners' witnesses.

Taking the increased value at from 65*l.* to 60*l.* per annum, the latter being the lowest value named, a deduction of 10*l.* or 15*l.* should be made from this sum in respect of the upper parts of the four windows on the first floor, which were above the line of the old wall, and in respect of which the Court cannot deal in this case, thus reducing the increased value to 50*l.* per annum. From this sum further deductions should be made in favour of the defendants to provide for the contingencies of the offices being unlet, for repairs, and for increased rates, and something for their enterprise. Upon the whole, I think the fair award to the rector would be 25*l.* per annum, or one moiety of the increased gross value, leaving the other moiety to the owners to provide for the payments mentioned, or for some profit to themselves. In other words, viewing it as an investment in household property paying six per cent., I allow three per cent. to the rector, who runs no risks for deductions from the payment, and three per cent. to the owners, out of which to provide for contingencies incident to property of this nature, and taking the remainder as profit.

Messrs. Rothschild, by their last arrangement with the

rector and churchwardens in reference to three old windows which they have enlarged, are paying at about this rate. By the old arrangement they paid 2*l*.:10*s*. per annum for three small windows, and on obtaining leave to enlarge them the payment was increased to 12*l*.:10*s*. I award 25*l*. per annum as the payment to be made by the owners of these premises for access of light and air from the churchyard to these lower windows.

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CONSISTORY COURT OF LONDON.

THE HOLY TRINITY, STROUD GREEN, FACULTY.

Side Chapel—Second Holy Table.

The Court granted a Faculty for the construction of a side chapel in a church for early services, and for placing a Holy Table therein, on being satisfied that it would be more convenient for the congregation and officiating minister, as well as a saving of expense, that early Communion should be celebrated in the chapel instead of in the chancel of the church.

1887.
July 19.

Beaufort appeared for the Vicar and Churchwardens.

Witnesses were examined in support of the Petition.

Dr. TRISTRAM.—The application in this case is for a Faculty to authorize the erection of a screen between the chancel and the east end of the south aisle of the church, and across the aisle, and the fitting up of the space enclosed by the screen as a chapel to be used for early daily prayer, and for the administration of early Holy Communion on week days and on Sunday mornings, when the congregation is a small one. For the

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latter purpose, the Court is asked to sanction the introduction of a Communion Table into the chapel, there being of course one already in the chancel.

The application is based on convenience and a saving of expense when the congregation is small; it is manifestly more convenient both for the congregation and the officiating minister that the former should be assembled within the limited space of the chapel instead of being scattered over a large church, and, according to the evidence, the difference of the cost in lighting and heating the chapel in the present case, instead of the church, for such services is about 50% per annum in favour of the chapel.

On these facts the Court would have no hesitation in granting the Faculty, provided it may by law do so, and the only legal question for its consideration is, whether it is competent to it, having regard to the wording of the Rubric and the 82nd Canon ordering that there shall be one Communion Table in a church, to authorize the introduction of a second one within a parish church.

In the Pre-Reformation period it was not unusual to have two or more altars in parish churches. These were removed under the injunctions, and in their place was substituted one Communion Table of wood. It is clear that the Rubric and the 82nd Canon contemplated there being only one Holy Table in a church, and if this had been an application to introduce one into the aisle simply, and not into what is to be practically a chapel, I am not prepared to say that the Court would have been justified in granting it. But this question does not arise in the present case.

I am aware that there are in the side chapels in many of our cathedrals Holy Tables, and my attention has also been directed to the fact that several of our bishops

have consecrated churches with Communion Tables in side chapels.

But these cases cannot be considered as having the force of legal precedents in this Court. For cathedrals not being within the jurisdiction of the Bishop's Court, alterations are made in them, and ornaments introduced into them, without the sanction of any judicial decision, or a judicial order; and in *Westerton v. Liddell* (Moore's Special Report, pp. 21, 22) it was held, that the fact of an ornament having been in the church at the time of its consecration, did not necessarily legalise it, or preclude its subsequent removal by Faculty, if the Court was satisfied of its illegality. The attention of the Court has also been directed to the fact, that Faculties have issued in other dioceses for the introduction of Holy Tables in side chapels in parish churches. But these, with the exception of one which came before me sitting as Chancellor of Ripon, in January last, have not been decreed upon evidence in open Court. The case which came before me in the Diocese of Ripon was an application by the vicar and churchwardens of the parish church of Leeds for the introduction into a side chapel of a Holy Table for use and convenience; and having had an opportunity of then fully considering the question, I decreed the Faculty to issue, and I adhere to that decision.

There is a principle laid down by the Judicial Committee of her Majesty's Privy Council in *Liddell v. Westerton* (Moore's Special Rep. p. 187), which may safely guide the Court in this case, and that is, that an ornament, though not prescribed by the Rubrics or Canons, may be introduced for use in a church, if subsidiary to the performance of the services of the Church as prescribed

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by law. On this ground a Credence Table was permitted to remain in the church. In the Rubrics or Canons there is no mention of or provision made for side chapels in parish churches. But there is no provision against them, and I think their introduction with a Holy Table in this chapel may be sanctioned by the Court, under the changed circumstances of the times, consequent on the demand for daily services, and for the celebration of early Holy Communion, on the ground of convenience, and to meet the requirements of the times.

The Court, therefore, will decree the Faculty as prayed.

CONSISTORY COURT OF LONDON.

Re ST. PAUL'S, WILTON PLACE.

Side Chapel—Second Holy Table.

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A Faculty granted for the construction of a side chapel in a church, with leave to place a Holy Table in the chapel. There must be such a separation between the chapel and the church that it shall appear to be in fact a chapel, though under the same roof as the church.

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Jeune, Q.C., for the Petitioners. It was proposed to build a small chapel in place of the vestry on the south side of the chancel. This vestry was practically disused, and it was proposed to place a small chapel on its site with the ordinary seats necessary for Divine service, with a Holy Table placed in the chapel. He should show that in the special circumstances of this church, and having regard to the requirements of the parish and the worshippers, it was most desirable to

have a smaller chapel in which Divine service could be performed. The parish was a very large one, numbering 9,000 persons, and the church was capable of containing 1,500 people. The church was very dark, and it was one which required for most services—certainly for early services—artificial light. The services in the church were very numerous—three daily as well as other services. The congregation sometimes at these services was very small relatively to the size of the church, and if the whole church were to be used when only twenty or a dozen persons were present the result was that there was great waste in many respects—there was a waste of light, a very considerable waste in respect to cleaning, and there was great waste in the voice of the person who performed the service. On these special grounds he put it that this chapel was desirable. With regard to the Holy Table to be placed in the chapel, the learned counsel observed that it was intended to be a subsidiary table, to be used when the other one was not used, and it was not a second Communion Table. The chapel was a subsidiary building, subsidiary to the main use of the church. In support of the application the learned counsel quoted the judgment of the Court in the case of *Holy Trinity, Stroud Green* (L. R. 12 Probate Div. 199).

The vicar and one of the churchwardens gave evidence in support of the application. At a meeting of the vestry held on the subject a resolution authorizing the application for a Faculty was passed unanimously. A large vestry had been built on the other side of the church. It was immensely important to have the chapel, and there would be considerable saving of expense.

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Dr. TRISTRAM.—The Court is of opinion that it ought to grant the Faculty prayed. Mr. Jeune has based the application on the true ground—namely, that the chapel ought to be taken by the Court as subsidiary to the main use of the church, and not in rivalry to it, and that therefore the Holy Table may lawfully be placed in it. No mention is to be found in the books, or in the cases, of side chapels such as the one proposed. The first Faculty granted for placing a Holy Table in a side chapel, as far as I am aware, was decreed by Dr. Swabey, as Chancellor of Ripon, after mature consideration, and with the entire approval of the late Bishop of Ripon (Dr. Bickersteth), for the placing of a Holy Table in a side chapel in the parish church of Halifax. There are, however, many instances, from thirty to forty in number, of Communion Tables to be found in chapels, in our cathedrals, and in side chapels in large parish churches. In January, 1887, after much consideration, I granted a Faculty in the Consistory Court of Ripon for one to be placed in the side chapel of the parish church of Leeds, with the sanction of the Bishop of Ripon, being satisfied by the evidence that its introduction would conduce to the comfort and convenience of the parishioners who attend early Communion, and the difference of the cost in lighting, heating, and cleaning the chapel, instead of the church, for such services being more than 80% less per annum. In July, 1887, a Faculty was moved for by counsel in this Court for the construction of a side chapel with a Holy Table in the parish church of Stroud Green, which I granted, for reasons stated in my judgment, and reported L. R. 12 Prob. Div. 199, *ante*, p. 117. The learned Chancellor of Newcastle (Chancellor Kempe) has

come to the conclusion that the granting of such a Faculty is unlawful, as being an infraction of the Rubrics and Canons, which prescribe that there shall be only one Holy Table in a church, holding that a side chapel must be taken to form, to all intents and purposes, part of the church, unless it be a description of chapel known to the law; that it is not such description of chapel, and is therefore a part of the church, and, being so, the introduction of a Holy Table into it is in law the introduction of a second Holy Table into the church. He adds that of "chapels," which are merely practically separate from parish churches, the law knows nothing, and if they are to be erected, it cannot be by judicial action. The question, until recently, was of first impression, and one of considerable nicety. The possible objections to granting such a Faculty mentioned by the Chancellor of Newcastle in his judgment occurred to Dr. Swabey, who conferred with me before granting the Halifax Faculty, as well as to myself, and we both thought they were deserving of serious consideration; but it is to be borne in mind that there is vested in the Chancellor as Ordinary considerable discretion in the exercise of his jurisdiction in relation to churches and churchyards, but which, as Sir John Nicholl in *Butt v. Jones* (2 Haggard's Ecclesiastical Reports, p. 424) observes, "must be a sound discretion, having a due regard to times and circumstances, and to the rights and interests of all parties concerned." He has power (amongst other things) to order by Faculty a portion of a church to be taken down, or to be appropriated for a vestry. Until recent years, there was only one vestry in parish churches known in practice, or to the law—the vestry used by the

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minister—but since the introduction of choirs in parish churches, choir vestries have, in many churches, become a necessity, and Faculties are now frequently granted for the appropriation of a portion of a church for an additional or choir vestry. The Chancellor has power, with the sanction of the Bishop, to grant a Faculty for the erection in a parish churchyard of a chapel, with a Communion Table in it to be used for the same purposes as modern side chapels are used, and it was in contemplation, had this Court felt itself precluded by law from granting the Faculty now asked for, to apply for Faculties, with the sanction of the Bishop of London, to authorize the erection of such chapels. It seemed to the Court that such a burden, and such a practice, ought not to be forced upon parishioners if it could be avoided by granting a Faculty for a side chapel with a Holy Table in it. There is also vested in the Bishop a discretionary power in relation to the erection of chapels. Ayliffe, in his *Parergon*, p. 164, in treating of chapels, says: “A chapel cannot be built or erected in prejudice of the mother church, nor without the Bishop’s authority.” There is no rule of law that the Court is aware of to preclude a bishop, with the concurrence of the minister of the parish, from sanctioning the erection of a chapel, and from consecrating it with a Holy Table in any part of a parish, even though it may not come within the precise description of chapels known in practice, taking care that it shall not be to the prejudice of future incumbents. There seems, therefore, no reason in law why the Chancellor, with the Bishop’s sanction, should not grant such a Faculty for a side chapel for the convenience of the parishioners on specified occasions, and not to be used for the per-

formance of usual and accustomed parochial services of the church.

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There must be such a separation between the chapel and the church, so that it shall appear to be in fact a chapel, though under the same roof as the church.

The Court decrees the Faculty as prayed.

CONSISTORY COURT OF LONDON.

Before THE LORD BISHOP OF LONDON.

With Dr. TRISTRAM, Q. C. (Chancellor), as his Lordship's Assessor.

(Under Sect. 83 of 1 & 2 Vict. c. 106.)

TANNER, Clerk (a),

v.

SCRIVENER, Clerk.

Curate's Licence—Notice to Leave Curacy—Verbal Notice—Sects. 95 and 113 of 1 & 2 Vict. c. 106.

T. was licensed to a curacy on the 8th of September, 1886. On the 21st of May, 1887, his vicar requested his churchwarden to submit to T. certain terms in writing for his signature, and in case he refused to sign them, to hand to him a written notice, dated May 21, 1887, stating that he terminated with his Bishop's written consent his engagement as curate at the expiration of *six months from the present date*. The churchwarden failed to see T. until May 24, when, on his refusing to sign the first notice, he handed him the notice to terminate

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his engagement as curate. On November 2, 1887, the vicar paid T. his quarterly stipend, and on November 24 he tendered him his proportionate stipend from November 2 to November 24. The tender was refused, on the ground that the notice was bad by reason of its having been dated three days prior to service, and purporting to take effect from its date, and not complying with sect. 113 of 1 & 2 Vict. c. 106.

(1) *Held*, That non-compliance with sect. 113 of 1 & 2 Vict. c. 106 will not invalidate a notice to quit a curacy, whether given by the incumbent or curate, and that such need not of necessity be in writing.

(2) That the notice given in this case ought to be read as meaning from the 24th of May, 1887, the day of service, and not from 21st of May, the day it was dated, the notice served being so worded that, coupled with the facts proved, T. could not mistake its object, namely, that it was to run from the date of service.

(3) That T.'s engagement as curate terminated by the notice on the 24th of November, 1887, and that his claim for salary up to the 2nd of February, 1888, could not be sustained.

(4) That as the litigation had been induced from a want of precision in the vicar's written notice, each party should pay his own costs.

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H. C. Richards appeared for the Rev. William Tanner.

Dennis for the Rev. Dr. Scrivener, the Vicar of Hendon.

The case was heard on oral evidence.

The LORD BISHOP stated that as the questions raised in the case were entirely questions of law, he should be guided by the advice of his Chancellor.

Cur. adv. vult.

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The CHANCELLOR. — The question in this case is, whether a notice given by Dr. Scrivener, the Vicar of Hendon, to Mr. Tanner to quit the curacy of Hendon, and personally served on him on the 24th of May last, is

a good notice under the 95th section of 1 & 2 Vict. c. 106.

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Two objections were taken by Mr. Tanner's counsel to the validity of the notice:—

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1st. That the formalities regarding notices prescribed by sect. 112 of 1 & 2 Vict. c. 106 had not been complied with, and that compliance with them was essential to its validity.

2ndly. That the notice as served did not in form constitute the six months' notice required by the 95th section of the statute.

As to the first objection, sect. 112 enacts, "That in all cases in which proceedings under this Act are directed to be by monition and sequestration such monition shall issue under the hand and seal of the Bishop, and such monition, and *any other instrument or notice* issued in pursuance of the provisions of this Act, and *not otherwise specially* provided for, shall be served" by showing the original notice to the party served, and leaving with him a copy, and if he cannot be found, by leaving a copy at his last residence, and affixing another copy to the door of his parish church, and the original notice with an affidavit of service is then directed to be filed in the Consistorial Registry of the diocese.

Sect. 95 enacts, "That an incumbent having first obtained the permission of the Bishop, to be signified in writing under his hand, may require a licensed curate to quit his curacy upon six months' notice thereof given to the curate."

The contention on behalf of Mr. Tanner is, that these two sections must be read together, and that in the service of notices given under sect. 95 the formalities prescribed by sect. 112 must be adhered to.

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The words in sect. 112 relating to notices are no doubt wanting in precision and perspicuity, and standing alone might be open to the construction contended for by Mr. Tanner's counsel. But the question upon which it is my duty to advise his lordship is, whether this is the only and the best construction of which these words are capable, and whether it is to be taken in law as their true construction.

If this section were applicable to curates' notices, it is obvious they must be in writing, as otherwise they could not be served in the manner directed by it, namely, by showing the original notice to the party served and leaving with him a copy, and so forth. But on referring to the 95th and two following sections, it will be found that there are five different notices in relation to curates provided for in these sections (two in sect. 95, two in sect. 96, and one in sect. 97), and that only one of these notices (the second one in sect. 96) is directed to be "in writing," and that in the other four cases, including the one now under consideration, the notices are directed to be given simply, the words "in writing" being omitted.

Taking these sections alone, the irresistible conclusion would be that when the Legislature intended that the notice should be in writing it is so expressed in the Act, and that where it intended to leave it optional to give a written or a verbal notice the words "in writing" are purposely omitted.

It is contended, however, that this omission is to be supplied by implication from the general expressions regarding "notices" used in the first part of the subsequent sect. 112. But after a careful consideration of the sections I have referred to and other sections of the Act, I have come to the conclusion that sect. 112 does not

apply to notices to leave curacies, whether given by incumbents to curates or by curates to incumbents, and that its application is limited to cases where proceedings are by monition and sequestration, and for the following further reasons:—

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The special object of this section is to prescribe the formalities to be observed in proceedings by monition and sequestration, and the words “*any other instrument or notice* issued in pursuance of the provisions of this Act,” relied upon as referring to notices given under sect. 95, are general words following the specific word “monition,” and come, I think, within the rule referred to by Mr. Dennis, “that general words following in a statute specific words of the same nature are to be read as referring only to the specific words, unless there be something in the Act to show that a wider sense was intended to be given to them (Maxwell on Statutes, 2nd ed., p. 405).

No reference is made in sect. 95 or in the two subsequent sections to sect. 112 as there is in the 54th section, where an order to enforce the residence of incumbents by monition and sequestration is “expressly required to be served in like manner as is thereafter declared with respect to the service of monitions.” The formalities of service, and the subsequent filing in the diocesan registry of the original notice, and of an affidavit of its service, required by sect. 112, are appropriate and usual formalities observed in analogous proceedings in the Ecclesiastical Courts, but are neither usual nor appropriate in the case of an ordinary notice to quit a residence or service.

The inconvenience of requiring the observance of such formalities in the case of notices to quit between incumbents and their curates when the party to be served is

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away from home (more especially if he is on the Continent), and the legal expenses consequent on such requirements—as in every case it would practically involve the employment of a solicitor—make it extremely improbable that the legislature would have gone out of its way to impose them by this Act for the first time upon the clergy; and the rule laid down by my Lord Coke, “that in determining the construction of statutes, an argument drawn from inconvenience is forcible in law” (1 Co. Litt. 97), may well be held to apply to the present case.

On the other hand, passages were cited from the works of Dr. Stephens and Mr. Cripps on the Laws of the Clergy, to show that in the opinion of those learned writers the formalities prescribed by sect. 112 did refer to notices given under sect. 95. For the above reasons, I have come to the conclusion that the first objection cannot be sustained.

I will now consider the second objection, that the notice must be read as running from the 21st, and not from the 24th of May, and that it is therefore not a good notice under the statute.

The material parts of the notice are the date at the head, “Hendon Vicarage, May 21st, 1887,” and the following words: “It is my duty to give you the present notice that your engagement as curate will terminate at the expiration of six months from the present date.”

What is the meaning of the concluding words, “from the present date”? Mr. Richards contended that they refer clearly and beyond doubt to the date at the head of the letter. Had they run thus, “six months from the above date,” the reference would have been beyond question. Mr. Dennis contended that they refer clearly and unmistakeably to the date of the delivery of the notice (May 24th), inasmuch as all notices to quit speak

from the service of the notice. Had the words been "six months from the date of the delivery of this notice," according to the form given in the Diocesan Calendar, their meaning would have been clear; but these words are not used, and although the rule that notices to quit speak from their delivery favours the contention of Mr. Dennis, I think that there is an ambiguity in the language of the concluding words of the notice, and the ambiguity being a patent one, extrinsic evidence is admissible to inform the Court of all facts in relation to the notice which were within the knowledge of Dr. Scrivener and Mr. Tanner on the 24th of May, as well as of their conduct in relation to it at the time of and subsequently to its service (Broom's Legal Maxims, 2nd edit. p. 472).

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What were the facts bearing on this question within the knowledge of Dr. Scrivener and Mr. Tanner on the 24th of May, the date of the delivery of the notice?

It appears by the evidence that they both were aware, and, indeed, without the evidence it would be assumed that they were both aware (as everyone is presumed to know the law), that the notice to be effective by the statute must run six clear calendar months from the date of service. It is clear, also, that Dr. Scrivener intended that the notice should be so served on Mr. Tanner as to be a good statutable notice, and that Mr. Tanner knew that such was Dr. Scrivener's intention. It is clear, also, that Dr. Scrivener always intended the notice to run from May 24th, the day of service, and Mr. Tanner from the evidence must or ought to have known that such was his intention.

With the knowledge of the above facts, I have come to the conclusion that the most reasonable interpretation to be put upon the concluding words of the notice is

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that they run from the date of its service, and not from the date at the head of the letter, provided such construction is not precluded by the following rules, to be gathered from the Common Law decisions on the construction of notices to quit, when given in writing.

There is some conflict between the old and more recent decisions in the Common Law Courts on the effect of mistakes or want of precision in forms of written notices to quit; but from the cases two rules may be deduced, as stated by Mr. John William Smith in his work on Landlord and Tenant, 3rd ed., pp. 375, 376. First, that the Courts will not adopt a construction at variance with the clear language of a notice to quit merely because otherwise it would be bad; secondly, that, subject to the above rule, Courts are very liberal in construing notices to quit in favour of the giver of the notice, provided it be so worded that the party served with the notice cannot mistake its object, and has not been misled by it. To interpret the concluding words as referring to the date of the delivery of the notice is plainly not at variance with the clear language of the notice, and such interpretation does not therefore militate against the first rule.

Does it then come within the second rule? I think it does. A Court is entitled by that rule to be liberal in construing notices to quit in favour of the giver of the notice so as to effect his intention, provided it be so worded that the party served could not and did not mistake its object, or was not misled by its terms.

What object had Dr. Scrivener in view by serving this notice? Clearly to terminate Mr. Tanner's services as curate at the end of six months from the date of the service. Did Mr. Tanner know that such was his object? I think from the evidence that I am bound to conclude

he did. He detected, no doubt, a want of precision in the language of the notice, from which a question might be raised as to whether it dated from the 21st instead of from the 24th of May, but I do not think that on that ground I am entitled to hold that he substantially mistook its object, and was misled by it.

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It was further submitted by Mr. Dennis, that Mr. Tanner had waived by his acts the error, if any, in the form of the notice. I am of opinion that the evidence does not establish a waiver, had it been material to give a decision on this point.

It is therefore my duty to advise his Lordship on the questions raised in this case as follows:—

1st. That Dr. Scrivener's non-compliance in respect of the service of this notice with the formalities prescribed by sect. 112 of 1 & 2 Vict. c. 106, does not vitiate it.

2ndly. That the notice ought to be read as running from the 24th of May, 1887, the day on which it has been proved to have been served.

3rdly. That the notice in law is a valid notice under sect. 95 of 1 & 2 Vict. c. 106, and that Mr. Tanner's services as curate of Hendon terminated on the 24th of November last, and that therefore his claim for one quarter's salary as due on the 2nd of February, 1888, cannot be sustained.

THE BISHOP.—I adopt my Chancellor's judgment as my own. I dismiss Mr. Tanner's claim.

Mr. Dennis asked his Lordship to condemn Mr. Tanner in costs.

THE CHANCELLOR.—The litigation has been induced by the want of precision in the notice served by Dr. Scrivener.

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Dr. Scrivener has led Mr. Tanner to a certain extent into this litigation. Moreover, the question as to whether these notices should be served and registered as prescribed by the 112th section of the statute has been for the last few years involved in considerable doubt, and is one proper to be submitted for a legal decision. I think there should be no order as to costs. Each party ought to bear his own costs.

THE BISHOP.—I decide that there be no order as to costs. Each party must pay his own costs.

CONSISTORY COURT OF LONDON.

Before THE LORD BISHOP OF LONDON,

Sitting with his Chancellor as Assessor.

(Under 6 & 7 Will. IV. cap. 85.)

IN THE MATTER OF A PETITION FOR THE GRANTING OF A
LICENCE TO CELEBRATE MARRIAGES IN THE PROPRIETARY
CHAPEL OF ST. GEORGE'S, ALBEMARLE STREET.

*Proprietary Chapel—Application for a Licence to Celebrate Marriages by
Licence—6 & 7 Will. IV. c. 83, s. 26—Construction of Section.*

1890.
May 6.

Five hundred members of the congregation of St. George's Chapel, Albemarle Street, in the Parish of St. George's, Hanover Square, petitioned the Bishop of London to grant a licence for the celebration of marriages in St. George's Chapel by licence. The application was opposed by the Rector of the parish on the following grounds:— (1) That the granting of the licence was opposed to the principles of the parochial system. (2) That it might entail a loss of income to future Rectors of the parish. (3) That the vicinity of the Chapel being only three-quarters of a mile from the parish church of St. George, could not be said to be remote from it, so as to bring the case within the preamble of the statute.

(1) *Held*, that the Bishop, if satisfied that it was for the convenience of the inhabitants in the vicinity of the chapel that marriages should be celebrated in it, ought not to be deterred from granting the licence prayed for by considerations arising from our parochial system, or from possible loss of income to future rectors of the parish.

(2) That in deciding whether or not this was a proper case in which to grant the licence, the word "remote," as used in the preamble, should be interpreted, not as having a narrow but a wide signification; and that when the transit from the district in the vicinity of the chapel was delayed from whatever cause, such as to make a real convenience to those residing in the vicinity of the chapel to be married in it, a licence for marrying in the chapel might properly be granted.

(3) That before granting the licence, the Bishop should have some evidence before him of the convenience that would follow the granting of the licence, and there being no such evidence in the present case, it was the duty of the Bishop to reject the present application.

Jeune, Q.C., and *Cyril Dodd*, for the Petitioners.

Cripps, Q.C., and *Bargrave Deane*, for the Rector.

The Case was heard on affidavits and oral evidence.

Cur. adv. vult.

Dr. TRISTRAM, the Chancellor of the Diocese of London:
In this case an application has been made by petition by 500 members of the congregation of St. George's Chapel, Albemarle Street, to his Lordship, as Bishop of London, to licence St. George's Chapel for the celebration of marriages under sect. 26 of 6 & 7 Will. IV. cap. 85.

The Petitioners state that the Holy Communion and the Baptismal Services are regularly celebrated in the chapel, and that to their knowledge many applications have been made to the Incumbent, the Rev. Dr. Kerr Gray, to celebrate the marriage of members of his congregation in the chapel, to which he has been unable to

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May 6.

PETITION FOR
A LICENCE
TO THE
PROPRIETARY
CHAPEL OF
ST. GEORGE'S,
ALBEMARLE
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1890.
May 6.

1890.
May 6.

PETITION FOR
A LICENCE
TO THE
PROPRIETARY
CHAPEL OF
ST. GEORGE'S,
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accede, owing to its not being licensed for the celebration of marriages.

The prayer of the Petitioners is supported by Dr. Kerr Gray.

The application on the face of it is a natural and reasonable one, and it is my duty to advise his Lordship whether there are any legal objections to its being granted.

The chapel is situate in the parish of St. George's, Hanover Square, and his Lordship, provided it be a case within the purview of the statute, may grant the licence asked for, "if he shall think it necessary for the due accommodation and convenience of the inhabitants of the parish, with the consent of the incumbent of the parish, or without his consent after he has had two calendar months' notice of the application." But an incumbent who dissents is entitled to deliver to the Bishop a statement in writing of the reasons for his dissent, and the Bishop is not to grant the licence until he has inquired into the matter of such reasons.

The Rev. Canon Capel Cure, the Rector of St. George's, Hanover Square, has refused his consent to the granting of the licence, and has delivered to his lordship the reasons in writing for his refusal. The Rector's first objection is, that no reason is assigned by the petitioners for making a change in the ancient law of the land. The answer to this objection is, that the granting of the application would not involve a departure from the ancient law of the land, but, on the contrary, a return to a rule of the Canon Law of England which was in force in this country in regard to marriages by licence from A.D. 1327 to 1753, when it was abrogated by Lord Hardwicke's Marriage Act. (See Archbishop Mepham's

Constitutions, A.D. 1327; Lyndwood, p. 273; Archbishop Zouche's Constitutions, A.D. 1347; 2 Johnson's English Canons, p. 411.)

By the English Canon Law, a marriage by banns (see Canon 62 of the Canons of 1603) could only be celebrated in the church of a parish of which one of the parties was a parishioner, and in which the banns had been published, but a marriage by licence might be celebrated in any church in the diocese named in the licence, whether the parties were or were not parishioners of the parish in which the marriage was to be celebrated.

The laity, prior to Lord Hardwicke's Act, very commonly took advantage of the liberty conceded to them by the English Canon Law of being married in churches other than their parish church, as I find, on referring to the registers of marriage licences granted by the Chancellors of the Dioceses of London and Canterbury, that, up to 1754, it was a usual practice to insert in the licence three or four churches in which the marriage might be celebrated, and in the London licences, oftener than not, their parish church is not named.

Marriages by banns or licence were formerly termed regular marriages, and marriages by a clergyman without banns or licence (and which, prior to 1754, were equally valid), were termed irregular or clandestine marriages; and the object of Lord Hardwicke's Act (which is entitled "An Act for the better preventing of Clandestine Marriages") was to put a stop to such marriages, on the ground that the practice in regard to irregular marriages facilitated the celebration of marriages which were bigamous, and of marriages of minors without the consent of their parents, and rendered the proof of such marriages, and of the legitimacy of the

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issue of such marriages, difficult and expensive.—15
Cobbett's Parliamentary Hist., pp. 1—86.

But this statute not only prohibited the celebration of irregular marriages, but also introduced alterations in regard to regular marriages by licence, in respect of which no complaints had been made, and instead of allowing the laity the liberty of the selection of the church in which to marry, required them to be married in a church or chapel of a parish in which one of the parties had resided for four weeks (reduced to fifteen days by 4 Geo. IV. c. 76), prior to the granting of the licence. It is in consequence of the restriction imposed by this statute, and continued by the Marriage Act of Geo. IV., that the present application has been rendered necessary.

Another reason assigned by the rector against the licence being granted, is, that it is undesirable to authorize the celebration of marriages in proprietary chapels on the ground that their origin is tainted, having been for the most part built as commercial speculations—that their existence is antagonistic to the parochial system, and that there is no security for their being permanently retained as places of worship for the Church.

The above, I think, is not an accurate account of the origin of proprietary chapels, or of their position in the Church.

In the Metropolis they were erected for the most part with the concurrence and by the aid of the great ground landlords of London to supply the spiritual wants of the continually increasing population on their estates, which, until the passing of the Church Building Acts (the first being passed in 1817), could not otherwise have been met. In their origin they were sanctioned by the Bishops

of London and the rectors of the large London parishes. It has been the practice of the Bishops of London for more than a century to license ministers to officiate in these chapels, who are as much subject to the jurisdiction of the Bishop and to the rules of Ecclesiastical Law as any of the other clergy in the diocese. It has also been the practice for the rectors of the parishes in which the chapels are situate, to give their consent in writing to the Bishop's licence being granted to the minister. But Lord Stowell, in 1792, in the Quebec Chapel case (*The Duke of Portland v. Bingham*, 1 Haggard's Consistory Reports, p. 161), intimated "that if such consent were causelessly withheld, it might require grave consideration (the Bishop having the general cura animarum of the diocese) to find the proper remedy against so improper an abuse of the general rights of the incumbent."

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Moreover, in the section of the statute under which the present application is made, there are expressions clearly enabling the Bishop to grant a licence for marriages in proprietary chapels. I think, therefore, that this objection ought not to prevail.

Another reason assigned by the rector against the granting of the licence is, that it would tend to diminish the present scanty income of the rector of St. George's, Hanover Square.

I am aware that owing to the division of the original parish into several ecclesiastical parishes, the rector's income has seriously diminished, and is no longer proportionate to his duties and position as rector of so important a parish.

It was formerly supposed, that as a minister is bound to reside in his parish to be ready to perform all Divine offices to his parishioners, he was entitled by custom to a

a district specified in the licence." It was contended by Mr. Cripps, as counsel for the rector, that the preamble to this section was the key to its interpretation, and that it prescribes two conditions precedent to the granting of the licence, namely, that the district in which the chapel to be licensed is situate should be populous, and also remote from the church or chapel in which marriages could be celebrated; and that when either of these conditions was absent, the Bishop would be acting *ultra vires* in granting the licence.

On the other hand, it was submitted by Mr. Jeune, as counsel for the petitioners, that the expressions referred to in the preamble ought not to be taken as restrictive of the enacting part of the section; and in support of his submission he referred to the rules laid down by Sir Benson Maxwell, in his work on the Interpretation of Statutes, at p. 39, "That the preamble cannot either restrict or extend the enacting part, when the language of the latter is plain as to its meaning or its scope; and that a preamble which is the recital of certain inconveniences as the motive for legislation would not exclude the enacting part from giving relief beyond the inconveniences recited," and referred me to the cases there cited.

The question here is, whether the language of the enacting part of the section plainly indicates that the Bishop, in adjudicating on the present application, is at liberty to disregard the recitals in the preamble, and to grant a licence for marriages in a chapel situate in a district which is in no sense remote from the church, or some other chapel in the parish, where marriages may be celebrated.

If the words "the inhabitants," in the sentence "for the due accommodation and convenience of the inhabit-

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ants," in the enacting part of the section, are to be read as relating back to the sentence "the inhabitants of populous districts remote from the parish church" in the preamble, the preamble will be restrictive, but if they refer to the words in the enacting part, "*the district to be specified in the licence,*" it will not be restrictive.

Upon a consideration of the words used in this section, as well as of their collocation, the language is not so plain as to bring it within the terms of the rule stated by Sir Benson Maxwell, so as to exclude the preamble from having in some sense a restrictive force. I think that the words, "the inhabitants," in the enacting part of the section, should be read as relating back to the preamble, and that the question, therefore, whether the district in which the chapel to be licensed is situated is or is not *in some sense* populous, or in some sense remote from the parish church, should form an element in adjudicating upon the present application.

At the same time, I think that the words "populous" and "remote" should be interpreted not as having a narrow but a wide signification, and that when a district, in the judgment of the Bishop, has a population sufficient in numbers, and is so situated that the transit from the district to the parish church, from whatever cause, may occupy an inconvenient length of time, the Bishop, for the convenience of the inhabitants of the district, might properly grant a licence under this section.

In the present case, the district in which the chapel is situated clearly fulfils the first condition of the preamble, that it should be populous, as the parish of St. George's, Hanover Square, contains a population of 15,000 inhabitants. But it is said, that it does not fulfil the second condition of being remote from the parish church,

as the actual distance between the chapel and the church is one-third of a mile.

I think, however, in the present case, the word "remote" should not be interpreted as having reference to distance by mileage only, but to the time that may, from the blocks in the streets during the London season, be occupied in the transit from the district to the parish church. During the season, owing to blocks, it might frequently take a bride more time to drive from Albemarle Street to St. George's Church than a drive of some miles in the country. I therefore think, that in the present case this condition might be held to be fulfilled.

There is, however, a further condition precedent to the granting of the licence imposed by the enacting part of the section which is not fulfilled. It is, that the Bishop shall be satisfied that the licence is necessary for the due accommodation and convenience of the inhabitants of the district.

Now the present application does not proceed from the actual inhabitants in any number of Albemarle Street and the neighbourhood, but from the congregation of St. George's Chapel, who reside in various parts of the metropolis, and the congregation generally could only benefit by the licence being granted provided one of the parties to a marriage took up a qualifying residence in the district by occupying a lodging in it for fifteen days. But, in my opinion, this section does not contemplate that the Bishop should grant a licence for this purpose.

Mr. Jeune urged, and with much force, that if members of the congregation were allowed to have their children baptised in the chapel, they should be allowed to be married in it, and that it was only natural that the laity should endeavour to get rid of the hard and fast

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line imposed upon them by Lord Hardwicke's Act, by which they were deprived of a right conceded to them for upwards of four hundred years, of selecting the church in which to be married by licence.

The grounds for the introduction of this restriction were twofold: (1) To interpose difficulties in the way of persons being married out of their own parishes, and thereby to facilitate the proof of marriages, at a time when there was no General Registry for Marriages; and (2) to facilitate the entry of caveats in the Episcopal Registries to marriages, to which objection might be properly taken, and so to check their celebration by licence.

The first ground for this restriction was removed in 1836 by the statute which established a General Registry for Marriages at Somerset House, and the second ground has been removed by the introduction of rapid postal communication and of the telegraph, by which caveats may be entered with the greatest ease and rapidity, and by reverting to the old law, with one modification, the check by caveats might be made much simpler and more effective than under the present system.

These are, however, good grounds to be urged for the amendment of the law, but not for straining of this statute in order to give effect to the reasonable wishes of the congregation.

As it does not appear that the licence would be for the due accommodation of the inhabitants of the district, in my opinion the case is not brought within the statute, and I therefore advise his Lordship to reject the application.

THE BISHOP OF LONDON: I make this my judgment, and pronounce accordingly.

CONSISTORY COURT OF LONDON.

ST. MARTIN ORGARS.

Light and Air secured by Faculty from Churchyard—Rector's Right to Rent—Evidence.

A Faculty granted, on the petition of the Rector and Churchwardens of a City parish, to give effect to an arrangement made between them (the Vestry consenting) and the owner of a freehold house which abutted on the churchyard, securing to the owner and his assigns an easement of light and air to certain of the lower windows of the house for 99 years, subject to the payment of a rent of 22*l.* per annum to the Rector for the time being, in whom the freehold of the church was vested.

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The Vestry Clerk moved for the Faculty. The case was adjourned for further evidence as to the Rector's interest in the churchyard.

June 13.

Jeune, Q.C., examined witnesses for the Rector.

Dr. TRISTRAM.—The churchyard of St. Martin Orgars, in Cannon Street, was closed for burials in 1856. The house, No. 26, St. Martin's Lane, abuts on the north side of the churchyard. The freeholder of this house (Mr. Stanley Slocombe), being desirous of rebuilding it, applied to the rector and churchwardens of the parish to obtain a Faculty authorizing the construction of an area in that part of the churchyard abutting on his house, so as to give light and air to rooms he proposed to construct in the basement and half-basement floor of it, and for this concession offered to pay 50*l.* and a rental for 99 years of 20*l.* per annum, provided the right to the easement of light and air during such period was secured

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to him and his assigns by a lease confirmed by a Faculty from this Court.

The rector and churchwardens, with the unanimous vote of the vestry, accepted Mr. Slocombe's offer subject to its confirmation by Faculty; and on the 30th of January last they applied to the Court for a Faculty for this purpose, when the Court, referring to a Faculty decreed by Dr. Lushington in 1831, securing to the General Post Office a right to lights in the adjoining churchyard for an annual payment, held that it had jurisdiction to accede to the application, and decreed a Faculty accordingly; but adjourned the case for further evidence and consideration on the question as to whether the rector solely, or only jointly with the churchwardens, would be entitled to the benefit of Mr. Slocombe's payments.

The case came on for further consideration and further evidence on the 14th of June last, when Mr. Jeune, for the rector, submitted that he was solely entitled to the benefit of these payments; and the cases cited by him (*Littlewood v. Williams*, 6 Taunt. 276; *St. Pancras Burial Ground*, L. R., 3 Eq. Cas. 173; *Ex parte The Rector of Liverpool*, L. R., 11 Eq. Cas. 15; *St. Martin's, Birmingham*, 11 Eq. Cas. 23; and *St. Nicholas Acons*, 60 L. T. N. S. 532) clearly establish that the party or parties in whom the freehold of this churchyard is shown to be vested will by law be entitled to the benefit of these payments.

The question, therefore, for the determination of the Court is, In whom is the freehold of this churchyard vested? Is it in the rector, or, as is not uncommon in the City parishes, in the rector and churchwardens jointly?

There was some evidence produced which, uncontra-

dicted or unexplained, would give colour to the suggestion that it was in the rector and churchwardens, namely, a Table of Fees payable to the parish of the date of about 1706, which was produced from the parish depositories, and extracts from the churchwardens' accounts of burial fees and dues received by them from 1753 to 1856.

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According to this Table of Fees the churchwardens were to receive 2*l.* for a burial in Sir William Cromer's vault, and 5*s.* for a burial in the vault under the French Church, and for a stranger, 1*l.*; and the minister, 15*s.* for a burial in Sir William Cromer's vault, and for a stranger, 1*l.*; and for a burial in the vault under the French Church, 5*s.*, and for a stranger, 1*l.*

The reasonable conclusion is that these vaults were erected at the cost of the vestry, and that the payments to the churchwardens in respect of them were made to the churchwardens on this account and not *ratione soli*.

It also appeared by the Table of Fees and the churchwardens' accounts from 1754 to 1856, that they received 2*s.* for a burial in a common grave in the churchyard, and the rector 3*s.* 6*d.* But Mr. Jeune submitted that these documents and payments did not afford sufficient evidence that the payments to the churchwardens were made *ratione soli*.

On the contrary, there was negative and positive evidence pointing the other way. There was no evidence of the churchwardens having received any fees for monuments or tombstones in the church or churchyard, which is the invariable rule in City parishes where they have an interest in the freehold.

It appeared also, that part of the old tower of the church formerly formed part of the rectory house, and

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that on its being pulled down, on the erection of a new rectory house, the Mayor and Corporation of the City of London, under the City of London Improvement Act, 1847, became purchasers of part of the site of the tower on the construction of Cannon Street, and that in the conveyance, dated 1853, to which the churchwardens were parties, it is recited that the freehold of the site of the tower was in the rector, and it was he who conveyed to the Mayor and Corporation.

It also appeared that in 1856, on the churchyard being closed for burials, and the Ilford Cemetery being constituted, under the Burial Acts, the parish burial ground, the churchwardens claimed no portion of the vault or grave fees for burials of parishioners in the cemetery, which they would have been entitled to do had they an interest in the freehold of the old parish churchyard.

The Court has, upon these facts, come to the conclusion that the freehold of the churchyard is in the rector, and the order of the Court is that the annual payment of 22*l.* (2*l.* of this being in substitution for the 50*l.* offered by Mr. Slocombe) be paid to the rector for the time being of the parish, and that the costs of this application be paid by Mr. Slocombe.

CONSISTORY COURT OF LONDON.

HAIG, Clerk; AND OTHERS

v.

BARLOW, Clerk.

(In the Matter of St. Mary, Islington, Burial Fees.)

The Burial Acts, 1852 and 1857—Vicar of Original Parish—Incumbents of New Parishes—Interment or Burial Fees—Brick and Private Grave Fees—Jurisdiction of a Bishop—Jurisdiction of Court.

The ancient parish of St. Mary, Islington, between 1830 and 1890, was divided into thirty-eight separate parishes for ecclesiastical purposes, under the Church Building Acts. In the old parish there was, prior to 1830, the parish church, and a chapel of ease, with a churchyard attached to each, which are within the district reserved as the ecclesiastical parish of the vicar of Islington. To the thirty-seven remaining ecclesiastical parishes there never were any consecrated burial grounds attached. In 1853 a burial board for the whole area of the ancient parish was established under 15 & 16 Vict. c. 85, and in 1855 the burial board acquired by purchase the present Islington Burial Ground for the use of the whole parish, a portion of which was consecrated. The churchyards attached to the church and chapel were afterwards closed for burials by an Order in Council. The Rev. Dr. Wilson, the vicar of St. Mary, Islington, from 1832 to 1886, received the interment or burial fees, and the fees for vaults, brick graves, or private graves, in respect of persons buried in them within the consecrated portion of the burial ground, up to the time of his death in 1886. A question having arisen between his successor, Mr. Barlow, and the incumbents of the new parishes created under the Church Building Acts, as to what proportion of the fees belonged to the incumbents—the fees since Dr. Wilson's death had been retained by the burial board, who were prepared to pay them over as the Court might direct—and the counsel on both sides had agreed that the questions should be argued on a special case.

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(1) *Held*, that the incumbents of the new parishes were entitled to the interment or burial fees in respect of the burial of persons dying within their respective ecclesiastical parishes.

(2) That the vicar of Islington is entitled to the interment or burial fees on the burial of non-parishioners, subject to his providing for the performance of the funeral service.

(3) That the vicar of Islington is entitled to the fees payable for brick or private graves in all cases.

(4) The decision as to burial or interment fees belongs to the bishop of the diocese under paragraph 3 of sect. 52, and sect. 32 of the Burial Act, 1852, and sect. 5 of the Burial Act, 1857, No. 2.

(5) That the proper Court in which to sue for the fees payable in respect of the brick and private graves is the Consistory Court.

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Dibden for the Incumbents of the New Parishes.

Bayford, Q.C., for the Vicar of Islington.

Cur. adv. vult.

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DR. TRISTRAM.—The questions raised by this case are three in number: *First*, whether the interment or burial fees for the burial of the inhabitants of the various new parishes carved out of the old parish of St. Mary, Islington, in the consecrated portion of St. Mary, Islington, Cemetery at Finchley, belong to the vicar of St. Mary, Islington, or to the incumbent of the new parish from which the burial takes place. *Secondly*, whether the interment or burial fees paid for burials of non-parishioners in this cemetery are due to the vicar, or are divisible between the vicar and the incumbents of the new parishes equally. And *thirdly*, whether the ground fees, paid for brick graves or for private graves in the consecrated portion of the cemetery, belong in all cases to the vicar, or whether, when paid in respect of a parishioner of a new parish, they belong to the incumbent of such new parish.

The solution of these questions depends upon the construction to be put upon sects. 32 and 33 of the Burial

Act, 1852 (15 & 16 Vict. c. 85), and upon sect. 5 of the Burial Act, 1857, No. 2 (20 & 21 Vict. c. 81).

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An application was made to the Lord Bishop of London by the incumbents of the new parishes, and concurred in by the vicar of St. Mary, Islington, to determine the questions in dispute between them in relation to these fees under sect. 52, paragraph 3, of the first Act, and sect. 30 of the second Act; and his Lordship, according to the practice of the diocese, referred this matter for argument and consideration before this Court, and for my opinion thereon.

A petition was accordingly filed in the Court on behalf of the incumbents of the new parishes, with a special case stated jointly on behalf of the incumbents and the vicar, praying that counsel might be heard thereon, and for an order to be made by the Court upon the questions in dispute.

At the opening of the case it was stated by Mr. Dibden, who appeared for the incumbents, and by Mr. Bayford, who appeared for the vicar, that as the Bishop's jurisdiction to determine the question, or some of the questions, raised was subject to some doubt, counsel had agreed to waive all objections to the exercise by his Lordship of such jurisdiction.

Jurisdiction is conferred upon the Bishop of the diocese by paragraph 3 of sect. 52 of the Burial Act, 1852, "to decide differences that might arise between incumbents in respect of fees payable to them under that Act"; and by sect. 30 of the second Burial Act, 1857, this provision is to be read and construed as if repeated in the second Act.

The intention of the Legislature was, no doubt, to give the Bishop jurisdiction to decide all questions arising between incumbents relating to fees reserved to them

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under these two Acts, so as to avoid their being forced into litigation on such matters in the Ecclesiastical or Civil Courts; but the sections are so worded as to raise considerable difficulties in ascertaining what their precise legal effect is. As, however, the decision I am about to give depends upon the construction to be put upon certain clauses in the Burial and Church Building Acts, and as the Courts of Common Law have already put a construction upon these very clauses, in so far as they relate to the interment fees, which I shall follow and adopt, the question of jurisdiction, for this and another reason which I will presently mention, becomes immaterial.

All the facts material for the consideration of the questions raised have been agreed upon, and are stated in the special case filed, and are substantially as follows:—

The parish of St. Mary, Islington, is an ancient parish. Prior to 1830, for ecclesiastical as well as for civil purposes, it constituted one parish. Between 1830 and 1888, thirty-seven new ecclesiastical districts or parishes were carved out of it. In 1830 there were in the parish, in addition to the parish church and a chapel of ease, three chapels recently erected, and Dr. Daniel Wilson, afterwards Bishop of Calcutta, was then vicar of the parish. By an Order in Council issued in that year under 58 Geo. III. c. 45, s. 21, the old parish was divided into four districts for ecclesiastical purposes; one being called Trinity district, another St. Paul's district, and a third St. John's district, each being annexed to one of the new chapels, and the residue St. Mary's district, within which district the parish church and the chapel of ease were both situate.

In 1832, on the promotion of Dr. Wilson to the

Bishopric of Calcutta, the Rev. Daniel Wilson became vicar, and retained the vicarage until his death, which took place on the 14th July, 1886, and he was succeeded by the Rev. Haggard Barlow, the present vicar, who was instituted in January, 1887.

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Whilst Mr. Wilson was vicar, seventeen district chapelries, ten consolidated chapelries, one new parish—under 1 & 2 Will. IV. c. 38—and three Peel parishes, were constituted within the boundaries of the ancient parish. Subsequently to Mr. Barlow's institution three additional new parishes were also constituted within the ancient parish—namely, the consolidated chapelry of St. Saviour, carved out of St. Mark's, Tollington Park, and St. Mary's, Hornsey Rise; the consolidated chapelry of St. Matthew's, carved out of St. Luke's, Upper Holloway, and of St. Andrew's, Islington; and the Peel district of St. Thomas, formed out of St. Anne's.

In the ancient parish of Islington, prior to 1830, there were only two consecrated burial grounds—namely, the churchyard, which surrounded the parish church, and the burial ground belonging to the chapel of ease, both of which remained within the ecclesiastical district of St. Mary's after the rest of the parish was separated from it for ecclesiastical purposes.

In April, 1853, a burial board for the whole area of the ancient parish was established under 15 & 16 Vict. c. 85, and in 1855 the board acquired, by purchase out of rates contributed by the whole parish, the site of the present Islington burial ground, intended for the use of the whole parish, a portion of which was consecrated. This is the sole parochial burial ground for the parish of Islington. The late vicar, up to the time of his death, in 1886, received all the interment or burial fees; also

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the ground fees, fees for brick and private graves due to him under sects. 32 and 33 of the first Burial Act, 1852, in respect of the consecrated portion of this ground. Since his death these fees have been received and retained by the board, and will be distributed according to the directions contained in the order made in this case.

In the Cemetery Table the vicar's fees are classified under two heads—the ground fees and the interment fees.

The ground fees are charges for brick graves and for private graves. The vicar's fee for a double brick grave is 3*l.* 17*s.* 0*d.*, and for a single brick grave half this amount. For a private grave, 1st class, 1*l.* 18*s.* 6*d.* For 2nd and 3rd class, 1*l.* 1*s.* 0*d.*

The vicar's interment fee in private graves is 6*s.* In other graves, 4*s.* 8*d.* and 4*s.* 2*d.*

I will now proceed to consider the first question raised, namely, whether the duty of officiating at the burial of a parishioner, removed from a new parish, in this burial ground, with the title to the interment fee for so doing, is with the incumbent of the new parish, or with the vicar.

It was admitted by Mr. Dibden, and is established by the cases, that, under the Burial Act of 1852, the incumbent of a new parish would have no claim either to officiate or to the fee, and that his claim must rest solely on sect. 5 of the Burial Act of 1857, No. 2.

To bring himself within this section he must satisfy the Court, first, that he is an incumbent of a separate and distinct parish for ecclesiastical purposes so created either by the Peel Acts, or coming within the meaning of sect. 14 of Lord Blandford's Parishes Act, 19 & 20

Vict. c. 104. For this purpose he must establish his right to publish banns and to celebrate marriages, baptisms, and churchings in his church, and to receive the surplice fees for the same; and, secondly, that there is no burial ground specially provided for this ecclesiastical parish, and that the Islington burial ground was acquired by rates contributed by the inhabitants of what is now his parish.

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The admitted facts in the case establish to the satisfaction of the Court, that all the incumbents of the thirty-four ecclesiastical parishes, constituted prior to the death of the late vicar, were entitled to publish banns, and to solemnize marriages, baptisms, and churchings in their respective churches, and that very many of them were previous to, and the remainder of them were on the death of the late vicar, entitled to receive, for their own benefit, the surplice fees due for the performance of these duties, thus fulfilling the requirements laid down by the first proposition.

With regard to the three ecclesiastical parishes established in 1888, the incumbents of two of them, namely, those of St. Saviour and St. Matthias, are, by virtue of sect. 10 of 8 & 9 Vict. c. 70 (the statute under which they were constituted), entitled to perform the above offices of the Church in their respective churches, and are entitled to the surplice fees due for the performance of these offices under deeds of surrender of such fees executed in favour of them and their successors by the incumbents of the ecclesiastical parishes out of which they were formed.

The third ecclesiastical parish, created in 1888, namely, St. Thomas, having been constituted a Peel District under 6 & 7 Vict. c. 7, and the church having been consecrated

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in the same year, the incumbent thereof has, since its consecration, been entitled, under sect. 15 of that Act, to perform the above offices in the church, and to receive the surplice fees payable for the same for his own benefit.

The requirements laid down by the first proposition are thus also fulfilled in the case of these three churches.

The admitted facts in the case further establish that no burial ground has been specially provided for any one of these thirty-seven ecclesiastical parishes, and that the Islington burial ground was acquired by rates, to which the inhabitants of the districts now forming these ecclesiastical parishes contributed, thus fulfilling the requirements laid down by the second proposition.

My finding on the first question is, that the incumbents of the thirty-four ecclesiastical parishes constituted prior to the death of the late vicar are entitled since his death to the burial fees paid to the board in respect of remains removed from their respective parishes, and that the incumbents of St. Saviour and St. Matthias are entitled to the burial fees paid in respect of remains removed from their respective parishes from the date of the deeds of surrender of such fees, and that the incumbent of St. Thomas is entitled to the like fees from the date of the consecration of the church of St. Thomas. This finding is in entire conformity with the judgment of the Exchequer Chamber delivered by Chief Baron Kelly in *Cronshaw v. The Wigan Burial Board* (Law Reports, 8 Queen's Bench Cases, 217).

I will next proceed to consider the second question raised, namely, whether the fees paid for the burial of non-parishioners in this ground are due to the vicar, or

are divisible between the vicar and the various incumbents of the new parishes equally.

As the Burial Act, 1857, No. 2, confers on incumbents of new parishes no rights to fees for the burial of non-parishioners, the answer to this question depends upon the effect of sect. 32 of the Burial Act, 1852, and sect. 52.

The paragraphs in these sections bearing on this question are as follows:—

(1) “A consecrated burial ground is to be deemed the burial ground of the parish for which it is provided.”—Sect. 32.

(2) “The word ‘parish’ means every place having separate overseers for the poor, and separately maintaining its own poor.”—Sect. 52.

(3) “The minister of the parish from which the remains are removed is to perform, or to provide for the performance of the burial service of such parishioners in the consecrated portion of the ground, and shall be entitled to receive the same fees in respect of such burials which he had previously enjoyed and received.”—Sect. 32.

There is no mention in this section of fees for the burial of non-parishioners in the consecrated portion of the cemetery. But non-parishioners are not entitled as of right to burial in a parochial churchyard or burial ground. They can only be buried there by permission of those who have the control of the churchyard or burial ground in matters of burial, and usually only on the payment of a double or some extra fee. But if buried there, the vicar of the parish to which the churchyard or burial ground belongs, is, by Ecclesiastical Law, entitled to perform or to provide for the performance of the service, and to the surplice fees for so doing.

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There being no express provision in sect. 32 as to the burial of non-parishioners, and this consecrated part of the cemetery being substituted for the old parish burial grounds, the rights of the vicar under Ecclesiastical Law, in reference to the burial of non-parishioners in this new burial ground, and to the surplice fees for the same, remain the same as they were in the old parish burial grounds.

My finding on the second question is that the vicar of St. Mary, Islington, and his successors, are entitled to perform, or to provide for the performance of the burial service in the consecrated portion of the cemetery at the funerals of non-parishioners, and to receive the burial fee due for the same.

This finding accords with the judgments delivered by the Court of Common Pleas in *Day v. Peacock* (31 L. J., N. S. C. P. 225). Chief Justice Erle, in delivering his judgment, says: "The construction to be put upon sect. 32 is this, viz.: that every incumbent of a district having a burial ground is to have the same rights for the performance of the burial service, and to have the same fees in respect of burials which he previously enjoyed." Mr. Justice Byles was of the same opinion, and adds: "Nobody can doubt the desire of the Legislature in passing the statute was, that clergymen should not be deprived of the rights and emoluments they previously had."

I now proceed to the consideration of the third question, namely, whether the ground fees for brick graves and for private graves in the consecrated portion of the cemetery in all cases belong to the vicar, or are due to the incumbent of a new parish, when paid in respect of a late parishioner of such new parish.

The exclusive right of the vicar to all the ground and monumental fees, or the right of the incumbent of a new parish to share them with him, depends entirely upon the construction and effect of sect. 33 of the Burial Act, 1852, as the Burial Act, 1857, No. 2, contains no provision in relation to these fees.

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The words of the section are: "Any burial board may sell the exclusive right of burial, either in perpetuity or for a limited period, in any part of the burial ground, also the right of constructing any vault, with the exclusive right of burial therein in perpetuity, in such burial ground, but there shall be payable to the incumbent or minister of the parish out of the fees or payments to be paid in respect of any rights acquired under this enactment in the consecrated part of such burial ground (in lieu of the fees or sums which he would have been entitled to on the grant of the like rights in the burial ground of his parish) such fees or sums as shall be settled or fixed by the vestry with the approval of the Bishop of the diocese, or if no such fees or sums shall have been so settled, then such fees as he would by law or custom have been entitled to on the grant of the like rights in the burial ground of his parish."

I do not find that a judicial construction has ever been put upon this clause in the numerous suits in the civil Courts in relation to fees payable under the Burial Acts.

It is obviously a compensation clause, and to enable any incumbent to take a benefit under it, he should show that there was formerly a burial ground in his parish or district from which he derived ground fees; that it had been closed for burials, and that the Islington Cemetery was substituted for it; and that by reason thereof he

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had sustained a loss in fees. The words in the section, "that the fees to be paid to the minister under this section are to be in lieu of the fees he would have been entitled to on the grant of the like rights in the burial ground of his parish," clearly indicate such to be the intention of the clause.

None of the thirty-seven new parishes ever had any parochial or other burial ground annexed to or within the district which forms their parish, and the incumbents of such parishes could consequently sustain no loss of ground fees by reason of the Islington Cemetery becoming the burial ground of the ancient parish.

On the other hand, there were two old churchyards within the ecclesiastical parish of St. Mary, Islington, in 1835, the date of the acquisition of the Islington Cemetery, in which the vicar of Islington had the exclusive right of officiating at burials, and the exclusive title to all vicarial ground fees derived from the two churchyards. By the closing of these churchyards, these fees were lost to the vicar, and it is in compensation of such loss that he is entitled under sect. 33 to receive the vicar's ground fees for brick and private graves payable in respect of the cemetery.

My finding, therefore, on the third question, is, that all the ground fees for brick and private graves, payable in respect of the consecrated portion of the Islington Cemetery as vicar's fees under sect. 33 of the Burial Act, 1852, are due to the vicar for the time being of St. Mary, Islington, who, although his ecclesiastical parish was by the Order of Council of 1830 decreased in size, still retains the status of vicar of the civil parish of St. Mary, Islington, and of vicar of the ecclesiastical parish of St. Mary, Islington, to which he is instituted or inducted in like manner as other vicars are.

The only further question that remains for the consideration of the Court, is the form in which the order should be made, and this depends upon the question of jurisdiction.

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By paragraph 3 of sect. 52 of the Burial Act, 1852, the Bishop of the diocese had clearly jurisdiction to decide differences as to interment fees, arising between two or more incumbents, under sect. 32 of that Act; and as this paragraph is to be read as if incorporated in the Burial Act, 1857, No. 2, the inference is, that it was intended to give the Bishop jurisdiction to decide similar differences arising between incumbents under sect. 5 of the second Act, else why incorporate it in Act No. 2?

But paragraph 3 of sect. 52 of the first Act contains no reference to ground or monumental fees, secured to vicars under sect. 33 of that Act; and, in my opinion, it does not confer on the Bishop jurisdiction to decide differences in reference to these fees. I have, therefore, to consider whether this Court has jurisdiction to determine such questions. There can be no doubt that the proper Court in which to sue for a burial fee is the Ecclesiastical Court. It is so laid down in the books and cases. Where the fee depends upon custom, issues as to the existence or the validity of the custom are triable at common law; but all other points are left to the spiritual Court. See *Spry v. Gallop*, 16 Mee. & Welsby, 731. In this case Dr. Spry, the rector of Marylebone, sued the master of the Marylebone Workhouse for 1s. 6d., for the burial of each pauper in the Parochial Burial Ground, and based his claim to the fee on two grounds:—1st. The provisions of a local Act. 2nd. Custom. The Court held, that he could not claim under the provisions of the local Act, as in fixing the fee its

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provisions had not been complied with; and that he could not claim by custom, as the evidence failed to establish a good customary fee. But the Court held, that if he had established a good claim by custom, he had sued in the wrong Court, and should have sued in the spiritual Court. For although, if the fees had been paid over to a third party, he might have recovered it in a civil Court, the master of the workhouse had, in that case by agreement, made himself liable to pay the fees, and might therefore be sued in the spiritual Court for them. In the present case the burial board is, by the Act, bound to pay the fees recognised by or fixed under the Act to the party entitled to them; and the board is prepared to pay them to whoever this Court shall decide is entitled to them; and the vicar and incumbents all consent to the questions raised by the special case being decided by this Court.

The origin of the claim to ground fees in churchyards throws material light on this question. The vicar is not entitled to these fees by Common Law, or by custom, or even by statute; and I know of no case in which a vicar has recovered such fees in a civil Court. As regards the ground fees, by Ecclesiastical Law no portion of a churchyard can be appropriated in perpetuity, or for any definite time, as a private burial place, or for the erection of a vault, except by Faculty. See Lord Stowell's observations in *Gilbert v. Buzzard*, 2 Hagg. Consist. Reps. 353.

Since the Reformation, but not before, as far as I can trace, the practice of the Ecclesiastical Courts has been, in granting a Faculty for a vault or private burial place, to issue the Faculty subject to the payment of a fee to the vicar. In the Diocese of London a scale of fees

chargeable by the vicar or vestry for vaults, is, by the practice of the diocese, fixed by the vestry, subject to the Chancellor's approval and confirmation. Scales of fees, so fixed and confirmed, repeatedly come before me officially. I recollect seeing one case of confirmation granted 140 years ago, and another 190 years ago.

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The fee was allowed in consideration of the freehold of the churchyard being vested in the vicar, and of his trouble in the matter, and in order to prevent too frequent applications being made for the granting of such Faculties; and was originally established, I take it, on the principle stated in *The Dean of Exeter's Case* (3 Keble, 384), "that when a licence is required the grantor may stand on his own price."

The vicar can only enforce payment of the fee in a Faculty suit.

In the case of vaults, although not in the case of monuments or tombstones, the Ecclesiastical Court, in authorizing alterations in churches and churchyards, will not recognize the title to a vault unless it has been erected under, or confirmed by a Faculty.

There have been several suits for burial fees due under the Burial Acts by arrangement in the civil Courts on the Common Law as well as on the Equity side, in which the burial boards have been defendants. But Vice-Chancellor Kindersley, in *Tuckniss v. Alexander* (1 Dr. & Sm. 614), and Mr. Justice Kay, in *Stewart v. The West Derby Burial Board* (L. R. 34 Ch. D. 314), felt some hesitation in assuming jurisdiction to entertain the suit, although want of jurisdiction was not objected.

In relation to the ground fees, although the civil Courts have concurrent jurisdiction, I think the Eccle-

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siastical Court has not been deprived of its jurisdiction in the matter.

The order will be that the fees be payable in manner already indicated, and it will be a joint order—by the Lord Bishop of London, so far as his Lordship lawfully can or may make it—and by the Judge of this Court, so far as he lawfully can or may make it.

All the costs of and incidental to this case will be payable out of the fund in the hands of the burial board as agreed between the parties interested in the fund.

The BISHOP OF LONDON.—I concur in this judgment, and adopt it.

CONSISTORY COURT OF LONDON.

THE RECONCILIATION SENTENCE AND SERVICE IN ST. PAUL'S CATHEDRAL.

Suicide in St. Paul's Cathedral during Divine Service—Reconciliation Court—Bishop's Jurisdiction—Sentence—Penitential Service.

1891.
February 7.

On Sunday morning, the 28th of September, 1890, A. B. attended the service in the Cathedral of St. Paul's, as one of the congregation, and during the service shot himself dead in the midst of the congregation. According to the evidence given at the coroner's inquest he was, at the time of the committal of the act, labouring under suicidal mania, but not otherwise insane; and was found, by the verdict of the jury, to have committed the act whilst of unsound mind. The Dean and Canons of St. Paul's referred the matter to the Bishop of London, directing his Lordship's attention to a suggestion made that a Sentence of Reconciliation might be necessary, but leaving it to his Lordship to determine what course, under the special circumstances, should be adopted. The Bishop having been advised by his Chancellor, on the authority of Bishop Gibson and Dr. Burn, and the cases, that he might,

under the circumstances, properly pronounce a Sentence of Reconciliation in a Bishop's Court, to be held in the Cathedral for the purpose, and that it might be legitimately accompanied, if his Lordship should so direct, with an appropriate Religious Service; held a Court for the purpose, accompanied with a Penitential Service, in which he pronounced a Sentence of Reconciliation.

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Objections having been publicly taken to the course adopted by the Bishop, his Lordship referred the matter, under the practice of the Court, to the Chancellor, as Judge of this Court, for consideration, with a request that he would deliver his opinion thereon in Court.

(1) *Held*, that on the authorities in the cases of the pollution of a church a Reconciliation Court may still be held by a Bishop in England, when he considers it advisable, under the circumstances, to do so; that such Court may be accompanied by an appropriate Religious Service; and that the Bishop may properly pronounce a Sentence of Reconciliation if he thinks it advisable, under the circumstances, in such Court.

(2) That the committal of a suicide in a church is an act of pollution, and, in the present case, was aggravated by its being committed in the midst of the congregation during service; and that it was, therefore, a case in which a Bishop, in the exercise of his discretion, might properly pronounce a Sentence of Reconciliation.

(3) That an attempt to commit or the committal of a suicide in a church is in contempt of the Sentence of Consecration pronounced in the Bishop's Court on the occasion of the consecration of the church, and constitutes an ecclesiastical offence; that if the offender survived, he is liable to be article in the Ecclesiastical Court for such offence; and that if he died, the only mode in which the Bishop can take notice of the offence is in a Court of Reconciliation.

DR. TRISTRAM.—At the Court held on the 14th of November last I stated that the Bishop of London had referred to me, as Judge of this Court, his Lordship being able by the practice to do so, the question raised as to the legality of the Sentence of Reconciliation pronounced in this case, for my consideration, with a request that I should deliver my judgment thereon in Court. I have considered it, and I will now proceed to deliver my opinion thereon.

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A suicide was committed in this cathedral on Sunday, the 28th of September last. The act was done openly

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during the morning service, and in the very midst of the congregation. The person who committed the act was stated, in the evidence given at the coroner's inquest held on his body, to have been at the time under the influence of suicidal mania, but not to have been otherwise insane, and was found by the verdict of the jury to have committed the act when of unsound mind.

There have been several instances of the committal of acts of self homicide in our cathedrals and churches, but this is the first recorded instance since the Reformation of such an act having been done during Divine Service and in the face of the congregation.

The occurrence naturally excited painful feelings amongst those present, and attracted considerable attention. There was a notion abroad that some public notice was required by Ecclesiastical Law or practice to be taken of the occurrence. It was supposed, and even openly stated in some quarters, that the act in question made the reconsecration of the cathedral necessary. The late Dean and the Canons of St. Paul's very properly referred the matter to the Bishop of London, directing his Lordship's attention to the suggestion that a Sentence of Reconciliation might be necessary, but leaving it to his Lordship to determine what course, under the special circumstances of the case, should be adopted.

Search was thereupon made by the Bishop's secretary for precedents on the subject. There were several instances found of a Sentence of Reconciliation having, prior to the Reformation, been pronounced after a homicide by violence in a cathedral or church. Notably, the Reconciliation of Canterbury Cathedral after the murder of Archbishop Beckett, and of Westminster Abbey on two occasions, of Norwich and Chichester Cathedrals, and several others.

Precedents of Sentences of Reconciliation subsequent to the Reformation were found principally in the records of the Protestant Church of Ireland, by which it appeared that such sentences had been frequently pronounced where a death by violence had been brought about in a church in Ireland.

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In England it was found that there had been a diversity of practice in this matter. In the diocese of Chichester, the present Bishop of Chichester has on one or more occasions, in the case of a suicide in a church, felt it his duty to pronounce a Sentence of Reconciliation accompanied with a penitential service. In the diocese of London, about the year 1830, a man having committed suicide in the Church of St. Mary, Aldermanbury, in the City, the church was closed for service on the Sunday following. In the diocese of Rochester, about twenty years ago, a man having hung himself from a beam in a church, there was in consequence thereof a special service held in the church, described as in the nature of a Reconciliation. Some years ago, a verger having committed suicide in Norwich Cathedral, Dr. Goulburn, the then Dean, and the Canons of Norwich, gave the matter their most mature and careful consideration, and caused search and inquiries to be made for precedents on the subject, and in the result came to the conclusion that the occurrence ought not to be passed by unnoticed, and decided upon holding a special religious service, the same in form as that which was ordered by the Bishop of London on the present occasion. Instances were reported of two or more suicides having taken place in or within the precincts of St. Paul's, but on inquiry at the Bishop's Registry I ascertained that in the cases referred to no death had actually taken place within the cathedral.

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There have been, no doubt, cases of suicide in a church which have been passed over without notice.

Upon the conclusion of the search and inquiry for precedents, a case was submitted to me on the 11th of October to advise the Bishop, as Chancellor, upon the question raised as to reconsecration, and generally on the facts as stated.

I advised his Lordship, on the 13th of October, that the reconsecration of the cathedral was unnecessary, on the ground that the consecration of a cathedral or church is a judicial sentence pronounced by the Bishop of the diocese in a special Court held by him for that purpose, by which the building "is set apart for ever from profane and common uses, and dedicated to the services of Almighty God for the performance of Divine Worship, according to the rites of the Church of England;" and that it was not in the power of an individual, by committing a wrongful act within the building, to reverse that sentence; so that, notwithstanding the suicide, the sentence of the consecration of the cathedral remained unimpaired. But I further advised, on the authority of Bishop Gibson and Dr. Burn (see 1 Gibson's Codex, p. 190; 1 Burn's Ecclesiastical Law, by Phillimore, p. 335), that under the circumstances the Bishop might properly pronounce a Sentence of Reconciliation in a Court to be held in the cathedral for that purpose, and that it might be legitimately accompanied, if his Lordship so directed, with an appropriate religious service.

The question whether or not a Sentence of Reconciliation shall be pronounced after such an occurrence, is one for the Bishop in his discretion to determine, as well as the question whether or not it shall be accompanied with a religious service. His Lordship having determined to

adopt the course I had pointed out as conformable with law, communicated his decision to the Dean and Canons of St. Paul's.

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The Reconciliation Sentence was pronounced, accompanied with a penitential service, in this cathedral, on the 13th day of October last. It attracted public attention, and led to a correspondence, and to inquiries and strictures in the public press as to the meaning, the legality, and the utility of the procedure. As this is the first occasion—in modern times, at least—in which this question has been the subject of public discussion, I carefully perused the letters and articles in the public press relating to it, so as to enable me to form a judgment of the force of the objections raised. The main objections were—That the procedure is not authorized by any law or practice in force since the Reformation; that the ceremony was a revival of a pre-Reformation practice; and that the petition presented by the Dean and Canons praying for a Sentence of Reconciliation and the sentence, were in their terms antiquated and unsuited to the times.

I will consider these objections in order.

First, as to whether the sentence is authorized by law or practice.

There is no law or canon of a date subsequent to the Reformation authorizing a bishop to pronounce this sentence. A bishop of the Anglican Church had undoubted jurisdiction, prior to the Reformation, to pronounce it where a church had been polluted by the shedding of blood, as well as in other cases of pollution. It was pronounced in an Episcopal Court held for the occasion.

Prior to the Reformation the Bishop's Ordinary Court was his Consistorial Court, presided over by his Chancellor,

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and he was also entitled to hold, what for convenience I will call, three Extraordinary Courts for special purposes on special occasions—namely, Visitation Courts, Courts for the Consecration of Churches and Churchyards, and Courts for pronouncing a Sentence of Reconciliation. (1 Gibson's Codex, p. 189.)

The Consistorial Courts, Visitation Courts, and Courts for the Consecration of Churches and Churchyards, have been held continuously since the Reformation, not by virtue of any particular statute or canon, but as being part of the ecclesiastical system established in this country prior to the Reformation, and which was continued by the Reformed Church as part of its ecclesiastical system, and so recognised in the civil Courts, and incidentally by the statutes and Canons of 1603.

Courts for the purpose of pronouncing a Sentence of Reconciliation have probably been rarely held since the Reformation, and then only on exceptional occasions.

That they have been held is established beyond doubt by the instances mentioned by Bishop Gibson in his Codex (Bishop of London from 1723—1747), not as isolated cases, but by way of example only; and after reference to a case, in which Archbishop Abbott insisted upon a Reconsecration instead of a Reconciliation, because the church after pollution had been pulled down and rebuilt, he adds—"Instances of this and the foregoing kind do sometimes happen, and I was willing that those who may be concerned in them should have, at least, a *general aim* of the proper and regular mode of proceeding, from the practice of former times, in cases of the like nature." (1 Gibson, p. 190.)

Dr. Burn, in his great work on Ecclesiastical Law, published 1770, cites the cases referred to by Gibson as

authorities in point. Thus two of the leading writers on Ecclesiastical Law and Practice during the last century give their weight and authority in favour of a Bishop's right to pronounce a Sentence of Reconciliation in the case of the pollution of a church. No doubt the three cases referred to by Bishop Gibson are instances of a lesser pollution of a church, as distinguished from pollution by blood-shedding.

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But the admission of the Bishop's right to hold such a Court and to pronounce such a sentence in any case of pollution necessarily involves the admission of his right to decide what cases of pollution are proper subjects for a Sentence of Reconciliation. Moreover, the Irish precedents since the Reformation are directly in favour of the Bishop's right to pronounce the sentence in the case of blood-shedding.

The objection as to its inutility raises the following legal considerations. The act in question was a clear contempt of a sentence of the Bishop's Court. It is a rule of every Court, civil as well as ecclesiastical, that where its sentence has been treated with contempt, the fact may properly be brought to its notice with a view to punishing the offender. When the offender is alive, he is liable to be articted in the Consistorial Court of the diocese for contempt. Where he is dead, as in the case of a suicide, his death terminates the jurisdiction of the Consistory Court to inquire into the contempt—the right to prosecute dying with him, and unless the Bishop has authority to take notice of it in a Reconciliation Court he is powerless in the matter. On this ground, as a matter of ecclesiastical order, the right to hold such a Court is not without utility.

The question, moreover, as appears to me, is one into

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which religious sentiment, rather than legal considerations enter, and is, therefore, left appropriately for the Bishop's sole determination.

The Bishop of London desires me to state that, in his opinion, it is advisable that there should be an uniform practice observed in this diocese, and that when such an occurrence takes place hereafter, it should be reported to the Bishop by the minister or churchwardens, with the facts, in order that he may decide whether or not it is a case in which there should be a Reconciliation Sentence accompanied with a penitential service.

To meet the objections taken to the terms of the Petition and Sentence, his Lordship requested me to prepare forms of a petition and sentence, which are now under consideration, and which will be deposited in the Registry to serve as precedents in future cases.

COMMISSARY COURT OF CANTERBURY.

FULLER, Clerk, AND OTHERS

v.

THE PARISHIONERS OF BEXLEY (DASHWOOD, PICKERSGILL AND
BEAN Intervening).

(The Bexley Faculty Case.)

*Claim to a Faculty or Prescriptive Pew established—Evidence required
to establish Claim—Possessory Title to Pews—Directions to Church-
wardens in respect of same.*

1879.
July 22.

The Rector and Churchwardens of the parish of Bexley petitioned for a Faculty to authorize the reparation and reseating of the parish church.

The owner of Hall Place, an ancient mansion in the parish, claimed two pews as annexed by a lost Faculty to his mansion.

The Court held that his claim to the larger pew was established; but that by the evidence he established only a possessory and not a prescriptive or Faculty title to the smaller one.

The owner of another mansion in the parish claimed two other pews in the church as annexed to his mansion by a lost Faculty. The Court held also that in this case a possessory and not a Faculty title to the pews had been established.

A Faculty for repairing and reseating the church was decreed, with a declaration that the owner of Hall Place had established his claim to the larger pew as a Faculty pew, and a possessory title to the smaller one; and that the other claimant had also established a possessory title to the two pews claimed by him; the Faculty containing directions to the churchwardens to allot to the claimants of the possessory pews, on the church being reseated, pews on the site of the old pews, having regard to the requirements of their families.

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The Rector, the Rev. J. M. Fuller, moved for the Faculty.

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Dr. Deane, Q.C., appeared for Mr. Dashwood, the owner of Hall Place, who claimed two pews as having been annexed to Hall Place by Faculty.

Dr. Swabey, for Mr. Pickersgill, owner of Lindon Hall, claiming two Faculty pews.

Bayford, for Mr. Bean, another claimant.

Mr. Layton, Parishioners' Churchwarden, opposed, in person, the claims to Faculty pews.

Cur. adv. vult.

Dr. TRISTRAM (Commissary-General).—The Vicar and Churchwardens of Bexley in this case applied for a Faculty

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to authorize them to repair and reseat their parish church, and to build a new south aisle and vestry.

To the proposal no objection was or could reasonably be taken, but in the petition for the Faculty it was alleged that three of the landowners in the parish claimed Faculty or prescriptive pews as annexed to their houses, which claims the petitioners were prepared to admit, and proposed that they should be protected by the Faculty.

But Mr. Layton, a parishioner who at Easter was elected parish churchwarden, appeared and insisted that the claimants to these pews should be put on strict proof of their rights.

After hearing the evidence, and arguments for and against the claims, on the 15th inst. I stated that I had come to the conclusion that Mr. Maitland Dashwood had established his prescriptive or Faculty right to the larger pew as annexed to Hall Place, but that the evidence adduced in support of his claim to the smaller pew was not satisfactory; and on this claim I ultimately reserved my judgment, in order that I might have an opportunity of more carefully considering the effect of the oral and documentary evidence adduced in support of it.

Upon a careful consideration of the evidence, I have come to the conclusion that the Court would not be warranted in deciding in favour of Mr. Dashwood's claim to the smaller pew; and in order to explain the reasons which have induced the Court to arrive at this conclusion, it will be necessary to recapitulate the grounds upon which I decided in favour of Mr. Dashwood's claim to the larger pew.

In the petition and in Mr. Dashwood's evidence both the pews were claimed as annexed to Hall Place. . It

appeared to the Court that as Hall Place had been for some centuries the principal mansion in the parish, and was of considerable dimensions, there was a probability that it would have a pew annexed to it by Faculty. There was evidence, also, of customary user by the tenants of Hall Place since 1804, excepting during twenty-five years, from 1809 to 1835, the tenant of Hall Place having during that interval consented to occupy certain pews in a gallery in lieu of this pew in the aisle by arrangement with the vestry. There was also evidence that the larger pew had been relined and painted, and, what is of more importance, had the seats widened by Mr. Dashwood in 1869. But the most cogent piece of evidence in support of the claim was the manner in which the vestry dealt with this pew on occupying it on behalf of the parish in 1809, and in restoring it in 1835 to the tenant of Hall Place. The vestry, when they first occupied it, at the expense of the parish divided it into four seats, and on the tenant of Hall Place resuming its occupation the vestry restored it, also at the expense of the parish, to its former condition.

The evidence in support of the claim to the smaller pew is not of the same character. There is not the same probability of there having been two pews annexed to the mansion as of one. The user or occupation of this pew has not been by the tenants of Hall Place, but by the tenants of Halcot, formerly called Mount Pleasant, a smaller and more modern residence on the Hall Place estate. In the plan of Bexley Church, signed by Mr. Stone, the vicar, dated July 27th, 1835, it is stated that No. 2 on the opposite side of the aisle formerly belonged to Mount Pleasant, but that the corner pew, No. 3, the pew now claimed by Mr. Dashwood, was given in ex-

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change for it. There is no evidence of substantial repairs done to this smaller pew by the owner or occupier of either house. But the user of the smaller pew by the occupiers of Halcot, and the statement on Mr. Stone's plan, is inconsistent with its being annexed to Hall Place. The owners and occupiers of Holcot have, however, established a possessory right to the pew. So long as it is required for the accommodation of the occupiers of that house, as Ordinary, I am of opinion that they ought not to be disturbed in such occupation, and I shall insert a declaration, if it is desired, in the Faculty to that effect.

I do not by this decision preclude Mr. Dashwood from hereafter establishing his claims to this pew as a Faculty or prescriptive pew, if he should be prepared to do so with the necessary evidence. The result of my decision is, that the Faculty will issue authorizing the proposed alterations in and additions to the church, with a declaration that Mr. Dashwood has established to the satisfaction of the Court his prescriptive claim to the larger pew in the north aisle as annexed to Hall Place; in other words, that the Court, upon the facts established, is warranted in assuming that the pew in question was at some time annexed to Hall Place by a Faculty, which has been lost, but that he has not established to its satisfaction a claim on the same ground to the smaller pew in the same aisle as annexed to Hall Place. That Mr. Pickersgill has failed to establish his prescriptive claim to the said two pews in the north aisle as annexed to Blendon Hall; but that Mr. Dashwood, having established a possessory right to the said smaller pew on the part of the tenants of Halcot, and Mr. Pickersgill having established a possessory right to the two pews claimed by him on the

part of the occupiers of Blendon Hall, the Faculty will contain a direction to the churchwardens of Bexley, on the church being repaired and reseated, to allot to the tenant of Halcot, having regard to the requirements of his family, one or more pews on the site of the said smaller pew; and to allot to the occupier of Blendon Hall one or more pews on the site of the said two pews claimed by him, having regard to the requirements of his family, with liberty to the parties to apply to the Court for further directions in the matter.

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v.

THE PARISHIONERS OF THE PARISH OF FOLKESTONE.

The Court was asked to authorize by Faculty the erection in a church of a painted window representing a priest administering the Holy Eucharist, in vestments worn by priests in this country in the 14th century. Objection having been taken to the design in the parish vestry, it was approved of by forty-four against thirty-two votes.

1880.
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(1) *Held*, That where the Court is asked, in the exercise of its discretion, to sanction the representation, by way of decoration in a church, of the celebration of a religious rite or ceremony, the rite or ceremony should be one that is sanctioned by the Church, and should be represented as being celebrated in the manner ordained by the laws of the Church; and that as the priest in this design was robed in

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vestments prohibited to be worn by the English clergy, the Court ought not to sanction it.

(2) That the circumstance that the design, if adopted, would give offence to many of the congregation, was a further reason for its rejection.

Faculty refused for the design.

Dr. TRISTRAM (Commissary-General).—This is an application to the Court, made by the Rev. Matthew Woodward, Vicar of Folkestone, and Mr. Thomas Spearpoint, one of the Churchwardens of the parish, to issue a Faculty authorizing certain decorations in the interior of the church—the insertion of certain painted glass windows—and an alteration in the churchyard.

The plans of the proposed alterations have been submitted to the parishioners in vestry and approved of without serious opposition, except as to one particular, to which it is the duty of the Court to refer.

It is desired by the Petitioners to place in the south aisle of the nave a painted window representing a priest, wearing the vestments worn by priests in this country in the 14th century, administering the Holy Eucharist to certain members of his congregation. To this design exception was taken in the vestry, on the ground that it represents a Romish priest celebrating the Mass, and is therefore not a fitting decoration for the parish church; and an amendment was moved rejecting the design, which was lost—32 voting for the amendment and 44 for the design.

The Court in these matters is bound to exercise a judicial discretion, and to give such weight to the opinion of the vestry as, in its judgment, it ought to give to it, according to the circumstances of the case under its consideration.

The answer made by the vicar to the objection taken

in vestry is, that the priest is represented as administering the chalice to the laity, and that his vestments synchronize with the date of the architecture of the window.

It appears, however, to the Court that where it is now desired to introduce into a parish church, by way of decoration, the representation of the celebration of any religious rite or ceremony, it will be a wise and legitimate exercise of its discretion to say that it should be the representation of a religious rite or ceremony sanctioned by our Church, and administered or celebrated in all respects as ordained at the present time by the laws of the Church.

As the celebrant priest in the design is robed in vestments which our clergy are not allowed to wear when officiating in their parish churches, and in vestments which they have been recently expressly prohibited from so wearing by the highest Ecclesiastical Court of appeal, it will, in my judgment, be a proper exercise of the discretion of the Court to decline to sanction this part of the design. The circumstance also, that the adoption of this part of the design would be against the wishes of a very considerable number, though a minority of the vestry, and that it is certain to give offence to some of the parishioners, is a further ground for its rejection.

The Court is prepared to grant a Faculty for all the other decorations and alterations proposed in the church, as well as for the alterations in the churchyard; but it rejects that part of the design of the window No. 2, in so far as it relates to the celebrant priest. The cause may stand adjourned to give the Petitioners time to consider in what manner they are prepared to alter the design, or what other course they may be prepared to pursue.

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COMMISSARY COURT OF CANTERBURY.

THE COUNTESS OF CHICHESTER AND THE TRUSTEES OF THE
ENBROOK ESTATE

v.

WOODWARD, Clerk.

(The Sandgate Faculty Case.)

Reservation by Founder of a Church prior to Consecration of a Gallery in Fee—Subsequent Exchange of Gallery for another Gallery confirmed by Deed, but unconfirmed by Faculty—Subsequent Confirmatory Faculty granted.

1888.
JUNE 12.

In 1822 the Earl of Darnley conveyed a piece of freehold land with a chapel thereon adjoining Enbrook Park (his park and mansion), excepting from the conveyance a gallery extending along the west side of the chapel, reserved for the use of himself and his heirs for ever, to trustees in fee, upon trust to allow the chapel to be used for services according to the rites of the Church of England, &c. The chapel was, shortly after the date of the conveyance, consecrated, and a chaplain was appointed to officiate in it. In 1849 the chapel was pulled down, and the present church was erected partly on its site and partly on land belonging to Sir John Bligh, who had succeeded to the Enbrook estate, in fee, without any conveyance of the land having been made by Sir John Bligh for the use of the church. Upon the completion of the church, a portion of the north gallery, sufficient to seat seventy-two persons, was by the trustees appropriated to Enbrook Park in lieu of the west gallery, which had been demolished in carrying out the plans for the extension of the church. In 1851 the Respondent was appointed Incumbent of Folkestone, and in 1854, by an Order in Council, the district of Sandgate, including the church, was formed into a consolidated chapelry. In 1866 Sir John Bligh, as the surviving trustee under the deed of 1822, conveyed the site of the old chapel, and in his own right the remainder of the site of the church, to the Incumbent of Sandgate and his successors in fee, subject to a

proviso that the Enbrook north gallery, with the private entrance thereto, should belong to him and his heirs for ever. The exchange of galleries had not been sanctioned by Faculty.

The Countess of Chichester, as tenant for life of Enbrook Park, and the trustees of the Enbrook estate petitioned for a Faculty confirmatory of the above exchange of galleries.

(1) *Held*, That Sir J. Bligh in 1849, in giving up to the parish his west gallery, gave full and valuable consideration for the present Enbrook gallery.

(2) That the chapel and its site having been made, by the deed of 1822, as well as by the sentence of consecration, subject to the jurisdiction of the Court, to perfect the title to the exchange of galleries a Faculty was necessary, and that the exchange by deed was not sufficient to give the Countess of Chichester a good title to the present gallery.

(3) That in conformity with the practice of the Ecclesiastical Courts, and with the recent decision of Lord Coleridge in the Queen's Bench Division of the High Court in *Bennett v. Faussett*, the Petitioners were entitled to the confirmatory Faculty prayed.

A confirmatory Faculty was accordingly decreed.

In this case the Countess of Chichester and her trustees filed a petition for a Faculty, confirmatory of an exchange of galleries in Sandgate Church, made by her father, Sir John Bligh, and predecessor in title, and confirmed by deed; but which had not been confirmed by Faculty.

Levett appeared for the Countess of Chichester and her Trustees.

The Rev. Matthew Woodward, as Vicar of Folkestone and patron of the benefice of Sandgate, appeared in person to oppose the granting of the Faculty.

The case was heard on oral and documentary evidence.

Cur. adv. vult.

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Dr. TRISTRAM (Commissary-General).—The question in this case is, whether it is the duty of the Court on the evidence before it to decree a Faculty to the petitioners (the Countess of Chichester and her trustees) confirmatory of an exchange of galleries in Sandgate Church, effected by a parol agreement made and acted upon since 1849, and ratified by an indenture dated the 23rd of March, 1867, but without the sanction of a Faculty. In former times it was the common practice of Ecclesiastical Courts, when no objection was raised by the parishioners, to grant Faculty pews annexed to houses in the parish on the owner of the house undertaking the cost of its erection, subject to the condition that he and his successors should keep it in repair, and also when churches were rebuilt or restored to grant Faculty pews to parishioners who were liberal contributors to the building or restoration fund.

The practice of granting Faculties excepting in the last class of cases, having been found to be inconvenient, has been for long discontinued, and in recent times the only cases in which pews have been appropriated by original Faculties are where a parishioner at his own cost has rebuilt or enlarged a church, and by confirmatory Faculties where for the convenience of the parish the owner of a private chapel, aisle, transept, or pew, or of a Faculty pew, has consented to exchange it for a pew in another part of the church. In the case of an exchange of freehold seats it has been the practice of late years to ratify the exchange by a confirmatory Faculty giving to the owner and his successors the exclusive use of another pew in another part of the church, and, where the owner is not entitled to convey the fee, so long only as the parish is allowed

by him and his successors undisturbed possession of his private chapel, aisle, transept, or pew.

The exchange effected in the present instance, not having been confirmed by a Faculty, is not a good exchange by ecclesiastical law, but as it was made in good faith and for valuable consideration, and has been acted upon for thirty-eight years, the Petitioners now ask the Court to perfect their title by granting them a Faculty confirmatory of the exchange. Mr. Woodward, the Vicar of Folkestone, out of which parish the ecclesiastical district or parish of Sandgate has been formed, appeared in person to oppose the issue of the Faculty, at least to the extent prayed, as patron of the living of Sandgate, which was vacant at the commencement of this suit, and also as an *ex officio* trustee under the original deed of conveyance of the site of the church in trust for church purposes. In the circumstances the Court considered that he had sufficient interest to entitle him to intervene in this suit, and that he was fully justified in so doing.

The following facts have been established in evidence:—In or about the year 1821 the then Earl of Darnley (grandfather of the present Countess of Chichester), at his own cost, erected a chapel on a plot of freehold land belonging to himself, situate in the village of Sandgate, and abutting on the grounds of his own mansion of Enbrook, and by an indenture dated April 29, 1822, he conveyed to the then Archbishop of Canterbury, Mr. Pearce, the incumbent of Folkestone, his son, the Hon. John Duncan Bligh, afterwards Sir John Bligh, and to two others this chapel and site in fee, upon trust to allow the same to be used for the celebration of Divine service according to the rites of the Church of

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England, excepting, however, from the conveyance "the gallery built and extending along the west side of the said chapel," and declaring that the same should remain and be to the use of himself and his heirs for ever, and as an absolute estate of inheritance in fee simple in him and them for ever, without paying any consideration for the same, and, with the exception of the gallery, that the whole of the pews and seats within the chapel should be vested solely in the trustees, upon trust to let and dispose of the same to the best advantage, and upon such terms as they should think proper, to any persons resident within the parish of Folkestone, temporarily or otherwise, and out of the rents to pay the clerk's salary, to keep the chapel in repair, to defray church expenses, and to pay over the balance to the minister of the chapel. Another provision in this deed bearing on the questions raised relates to succeeding trustees, and declares that any future Archbishop of Canterbury or incumbent of Folkestone should succeed to the trusts, if he should thereunto consent. Shortly after the date of this conveyance the chapel was consecrated and a chaplain appointed to officiate in it. The Earl of Darnley died in 1831, and by his will, subject to the life interest of the Countess (who died in 1836) therein, devised Enbrook and all his Sandgate property to his son, Sir John Bligh, in fee. In 1849 the chapel was pulled down and the present church was erected, partly on the original site and partly on land contiguous to it, being the property of Sir John Bligh, but which was not conveyed by him to the trustees of the chapel. The new church was not consecrated. After its erection a portion of the north gallery, sufficient to seat some seventy-two persons, was, by the

trustees, appropriated to Sir J. Bligh in lieu of the west gallery, to which he was entitled in fee. The reason for the exchange was that the continuance or reconstruction of the west gallery would have interfered with the plan for the extension of the church westward on the property of Sir J. Bligh. In 1851 Mr. Woodward was appointed incumbent of Folkestone, and by an Order in Council in 1854 portions of the parishes of Folkestone and Cheriton were constituted into a consolidated chapelry for the consecrated church of Sandgate, and after the death of Sir J. Bligh the patronage of the church was vested in the incumbent of Folkestone. In 1866 Sir J. Bligh, then the sole surviving non-official trustee of the deed of 1822, proposed to appoint new trustees of the deed; but under the advice of counsel no appointment was made, as it was considered that in accordance with the ruling in *Fitzgerald v. Fitzpatrick*, 33 L. J., Ch. 670, the Order in Council had put an end to the trusts of the deed. Sir J. Bligh then conveyed the original and extended site and church to the perpetual curate of the consolidated chapelry and to his successors in fee, with a proviso that the portion of the gallery on the north side of the church (which had been appropriated in 1849 to Sir J. Bligh and his heirs, in lieu of the old west gallery), with the private entrance thereto, should belong to Sir J. Bligh and his heirs for ever. Mr. Woodward had objected to the above appropriation of that portion of the north gallery. Sir J. Bligh died in 1872, and under his will his title to his mansion of Enbrook, with his Sandgate estate and his rights in the church, had devolved on his daughter, the Countess of Chichester, for life.

In objection to the present application, Mr. Woodward raised three points. The first was that the Order in

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Council of 1854 had, according to the decision of *Fitzgerald v. Fitzpatrick*, put an end to the deed of 1822, and to all the trusts and estates created by it. That order did withdraw the church from the trusts of the deed relating to the appointment of a clerk, the letting of seats, and the disposition of the seat rents; but, in the opinion of the Court, it did not deprive Sir J. Bligh of any freehold or equitable rights that were vested in him prior to its date in either the old or new gallery. Mr. Woodward's second objection was that he (Mr. Woodward) was a necessary party to the deed of 1867, and that his dissent to the appropriation of the north gallery rendered such appropriation invalid. As to that point, the chapel being by the deed of 1822 expressly made subject to the jurisdiction of the Commissary Court, and having been subsequently consecrated, to perfect the title to the exchange a Faculty was requisite, and the Court could therefore look at the deed only as evidence of the transaction and not as a ratification of it. The last point raised by Mr. Woodward was that the space occupied by the Enbrook gallery being much larger than was required for the accommodation of the family and household of Enbrook, its dimensions in a confirmatory Faculty ought, in justice to the parish, to be reduced. If the present application had been addressed to the discretion of the Court, it would have been prepared to reduce its dimensions; but it was addressed not to its discretion, but to its sense of equity, the foundation of the application being that Sir J. Bligh, by giving in 1849 to the parish the use of his west gallery, which was his own freehold, gave valuable and full consideration for the present Enbrook gallery, and there was no evidence to justify the Court in concluding

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that the exchange was unequal to the parish. It was due also to the Countess of Chichester to say that a portion of the Enbrook gallery sufficient to seat twenty persons had already been placed at the disposal of the churchwardens, and that it did not appear that further church accommodation was at present required. It had been the practice in the Ecclesiastical Courts, on being satisfied that there had been a fair exchange of seats, made for the convenience of the parish, and the parties, either to save expense or from ignorance of the law, had omitted at the time to apply for a Faculty confirmatory of the exchange, to grant subsequently such a Faculty. That is a practice which I have invariably in such cases followed, and the present is a case in which, in the opinion of the Court, it ought to be adhered to. But had the Ecclesiastical Courts not previously acted on that principle, after the recent decision of the Lord Chief Justice of England (Lord Coleridge) in the Queen's Bench Division in the case of *Bennett v. Fausett* (a), the Court would have been bound to do so now. The principle there laid down was clearly applicable to the case before the Court.

There was a further objection in the present case to the Court refusing a Faculty. A refusal would be tantamount to reprobating the very provisions in the deed of 1867 which induced Sir J. Bligh to execute it. The considerations for Sir J. Bligh executing it were that by it he secured to the proprietors of Enbrook the use of his north gallery in fee and of the entrance into it direct from the Enbrook grounds by a private door. The considerations for the incumbent of Sandgate executing it

(a) The Times Law Rep. 736.

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were that by it he obtained from Sir J. Bligh the legal estate of the extended site for the use of the church, and the right to the use of the private grounds of Enbrook adjoining the church, so far as might be necessary for its reparation; also the right to the old west gallery. The doctrine of the Court of Equity was that where a person claimed under a deed, he must accept it in its entirety—he could not approbate and reprobate. So that if the Court were to refuse the Faculty the Countess of Chichester and her trustees would be entitled in equity to repudiate the grants made by the deed of 1867 in favour of the church, and also to a declaration by the High Court that they were entitled to have a gallery on the site of the old west gallery annexed to Enbrook House as a freehold. It is, therefore, in the interests of the church that the Court should decree the Faculty to avoid expensive litigation in the High Court for the purpose of obtaining a declaration similar to the one made in *Bennett v. Fausett*. The Court is also of opinion that the proprietors of Enbrook should by the Faculty be allowed the exclusive use of the key to the outer entrance door into the Enbrook gallery for the purposes only of attending Divine service in the gallery, and of cleaning or repairing the gallery. Had the doors opened directly into the churchyard, so as to be capable of being utilized by the incumbent or any of the congregation, the incumbent might reasonably have claimed a key to that door; but it opened from a causeway in the Enbrook grounds, and could only be of use to those who had the proprietor's permission to enter the gallery from his private grounds, and could be, therefore, of no use to the incumbent. As the questions raised in the case were of importance, and as Mr. Woodward, by the course he had

taken, had been of assistance to the Court, he should be allowed by the petitioners any costs he might have incurred in appearing before the Court. The Court decreed the Faculty on the terms mentioned.

Mr. Woodward asked if there was any appeal.

The COMMISSARY-GENERAL: Yes; there is an appeal to the Court of Arches.

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COMMISSARY COURT OF CANTERBURY.

THE VICAR AND CHURCHWARDENS OF WEST PECKHAM
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v.

SIR FRANCIS GEARY, BART., AND OTHERS.

(The West Peckham Faculty.)

Faculty for Restoration of an Ancient Chancel—Freehold Chapel abutting on Chancel—Claim by Owner of Chapel to a right of way through Chancel to Chapel as incidental to his Freehold—Jurisdiction of an Ecclesiastical Court to adjudicate on Claim considered—General Law relating to Chancels considered—Notice of an intended Application for Prohibition—Practice as to Form of Order—Rule nisi for Prohibition granted—The Applicants for Faculty declining to show cause against the Rule nisi, their application for the Faculty dismissed.

1889.
November 29.

The parish church of West Peckham consists of a nave, a north aisle, and a chancel, chiefly of the date of the 13th, or early part of the 14th, century. At the east end of the north aisle there is a freehold chapel.

1889.
November 29.

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annexed to Oxenhoath, a mansion in the parish, and known as the Geary chapel, presumably of a later date than the chancel. Prior to the Reformation the entrance to the chapel would be presumably from the north aisle. Subsequently to the Reformation the owner of the chapel blocked up this entrance by constructing a raised vault, with monuments over it, on the floor of the western portion of the chapel, and at the same time made a new entrance door to the chapel from the churchyard. The owners also, at this time or later, erected over the vault and monuments a pew holding ten persons, approached by two flights of steps, one leading into the chapel, and the other into the chancel, the last four steps of the latter flight being placed within the chancel and near to the Communion rails. The owners of Oxenhoath were lessees of the Rectory of West Peckham under the Dean and Chapter of Rochester for nearly 300 years subsequent to the Reformation. The steps within the chancel had been placed there by the owner, whilst lessee, about 200 years ago. In 1886 the lease of the rectory, then held by Sir Henry Geary, whose family had been lessees, as owners of Oxenhoath for 200 years, expired, and the rectory reverted to the Ecclesiastical Commissioners in right of the Dean and Chapter of Rochester. The church and chancel had, for many years, been in a most dilapidated condition. A scheme had been set on foot for their restoration, by which the restoration of the church was to be carried out by private subscriptions, and that of the chancel by Mrs. Maximilian Dalison, who offered to devote a Memorial Fund of 1,000*l.*, of which she had the control, provided the plan which she proposed, and which had been approved of by the Ecclesiastical Commissioners, was sanctioned by a Faculty from the Court. Her plan involved the placing of the Communion rails to the west of the four steps on the chancel floor, leading to the Geary gallery, and their consequent removal. There was no evidence of the steps having been placed there by Faculty. Mr. Dalison, of Hamptons, whose family had been settled in the parish for some centuries, joined with his daughter-in-law, Mrs. Maximilian Dalison, in the present application, which was opposed by Sir Francis Geary as tenant for life of Oxenhoath and his Trustees, on the ground that it involved an interference with a right of way incident to his freehold chapel. The applicants for the Faculty proposed to substitute, at their cost, for the present entrance to the Geary pew, an equally convenient one from the north aisle. Various issues of fact and law were raised in the case, including an objection on the part of the respondents to the jurisdiction of the Court to interfere with what they alleged to be their freehold right.

(1) *Held*, that the plan proposed by the Petitioners for the restoration of the chancel was, on its merits, entitled to the sanction of the

Court, provided it did not interfere with the legal rights of the Respondents, and that the Court had jurisdiction by Faculty to order the removal of the four steps.

(2) That upon the evidence the Geary Chapel was presumably erected subsequently to the chancel, and that, if so, a freehold right of way to the chapel through the chancel could not have been acquired, or any right of way except by a Faculty from the Court.

(3) That there is no affirmative evidence of such a Faculty having been ever granted. That the presumption was against one having been granted prior to the Reformation, as, during such period, the greater chancels were occupied exclusively by the clergy, and used by them for the celebration of the services of the church; and that it was at variance with the practice of that time to grant to the laity a right of way through the sanctuary. That the four steps, having been placed in the chancel about 200 years ago by the owners of the chapel at a time when they were lay rectors of the parish, might legitimately have been placed there without a Faculty, the place occupied by them not being then required for the use of the parishioners.

(4) That the fee of the chancel is in abeyance, and that the freehold only is vested in the rectors for the time being in trust for the use of the parishioners, and subject to the control of the Ordinary, and that there is no power vested in the rector or chancellor, separately or conjointly, to alienate any portion of the chancel, though a portion of it may be appropriated by Faculty, subject to such appropriation being varied by a subsequent Faculty. That consequently the claim asserted on the part of the defendants that the owner of the chapel had acquired a permanent freehold interest in the soil upon which the steps were placed by undisturbed occupation for 200 years, under the Statute of Limitations, could not be sustained, its application being limited to a real estate alienable by the owner of property and to the extent of his interest in it only.

(5) That a right of way into the chancel by these steps could not be claimed under a Prescription Act (2 & 3 Will. IV. c. 71), it having been held by Lord Penzance, in *Crispe v. Martin* (L. R. 2 P. D. 15), that the Prescription Act did not apply to a claim to a pew in the nave of a church, the Act not being intended to alter the law with regard to what was required to make out a prescription, further than that the time of prescription was to run back to a much shorter period than to the time of Richard II.

(6) That the Ecclesiastical Court has no jurisdiction to try a suit directly in respect of title to freehold, but that, according to Lord Holt, where it has cognizance of the original matter, all matters incidental, though of temporal cognizance, and triable by the Common Law

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arise, they shall try the incident, but must try it as the Common Law would, by admitting such proof as the Common Law would. (*Shotter v. Friend*, 2 Salk. 547.) That the present suit being for the purpose of obtaining a Faculty to authorize the restoration of the great chancel, the freehold of which was in the rector, and it being necessary to carry out the plan sanctioned by the Court to remove the steps in question, and such removal being incidental to the principal matter, *if the ruling of Lord Holt is applicable to the question of the removal of the steps*, the case having been tried by oral evidence and on the principles of the Common Law, this Court would have jurisdiction to try it.

(7) That if the Faculty were to issue it must be on the terms that a convenient entrance be provided at the cost of the Petitioners by steps from the north aisle to the Geary pew.

(8) That if the defendants give notice of their intention to apply for a prohibition, and move for one within a reasonable time, the Court, in accordance with the practice of the Consistory Court of London, will suspend making any decree until the result of such application is communicated to it.

The Queen's Bench Division of the High Court having, on the application of the defendants granted a rule *nisi* for a prohibition, and the interveners having given notice to the Court that they were not prepared to be involved in the costs of expensive litigation in the Common Law Courts by showing cause against the rule *nisi*, the Judge dismissed the application for the Faculty.

July 19.

In this case, the Vicar and Churchwardens had petitioned the Court for a Faculty to authorize the restoration of the parish church of West Peckham on certain plans. Mr. Dalison and Mrs. Maximilian Dalison had entered an appearance as interveners, praying the Court to authorize them to restore the chancel upon a plan, which had been approved of by the Ecclesiastical Commissioners, who, as rectors of the parish, were liable for the repairs of the chancel, Mrs. M. Dalison offering to devote a sum of 1,000*l.* under her control to that purpose, provided that four stone steps placed in the chancel, forming the last steps of a staircase leading from the Geary pew into the chancel, were removed, she being

prepared to be at the cost of providing a convenient entrance from the pew into the north aisle.

Sir Francis Geary and his trustees appeared as defendants in objection to the removal of the steps.

Atlay appeared as counsel for the Interveners, Mr. Maximilian Hammond Dalison, of Hamptons, in the parish of West Peckham, and Mrs. Maximilian Dalison, his daughter-in-law, the testamentary guardian of her infant son, the tenant in tail in remainder of the Dalison estates in the parish, and the trustee of the fund proposed to be appropriated for the restoration of the chancel.

Rubie for Sir Edward C. Dering, Bart., of Oxenhoath, in the same parish, and for the trustees of the Dering estates in the parish.

On the case being called on, *Rubie*, on behalf of the defendants, objected to the jurisdiction of the Court to try the question of the right of way from the Geary pew into the chancel on the ground that it affected the freehold chapel of the defendants, and stated that at the close of the hearing he should ask the Court to decline jurisdiction.

Atlay opened the case for the Interveners. He admitted that the Geary chapel was a freehold chapel owned by Sir Francis Geary and his trustees, but denied that the owners of the chapel had a freehold right of way from their pew into the chancel, and examined Mr. Dalison, Mrs. Maximilian Dalison, and Mr. G. F. Bodley, the architect for the church, who had prepared the plan for the restoration of the chancel. He also put in documentary evidence.

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Rubie opened the case for the Defendants. He based his opposition to the removal of the four steps in the chancel, which formed part of the staircase leading from the chancel to the Geary pew, on five grounds:—

- (1) That the defendants and their predecessors in title had acquired, by long possession of the site on which the steps were placed, the freehold of the site under the Statute of Limitations.
- (2) That they had acquired a right of way from their pew by the steps under the Prescription Act (2 & 3 Will. IV. c. 71).
- (3) That they had acquired a freehold right to the site of the steps on the presumption that it had been conveyed to them by grant which had been lost.
- (4) That the right to the site had been conferred on them by a lost Faculty.
- (5) That they were entitled to the exit from the pew by the steps as a way of necessity.

In reference to the rights of owners of private chapels to the freehold of the site of the steps, he cited *Churton v. Frewin*, L. R. 2 Eq. 634; *Chapman v. Jones*, L. R. 4 Exch. 273; *The Duke of Norfolk v. Arbuthnot*, L. R. 4 C. P. D. 290; 5 C. P. D. 390; *Halliday v. Phillips*, L. R. 23 Q. B. D. 48.

In reference to the claim as under a lost grant, he cited *Dalton v. Angus*, L. R. 6 App. Cas. 740.

In reference to a right of way as of necessity, *Pearson v. Spencer*, 1 Best & Smith, 571; 3 Best & Smith, 761; *Horne v. Taylor*, Noy's Reports, 128; 3 Comyns' Digest, Ship Money (D. 5), p. 128; Gale on Easements, 6th ed.,

end of cap. 4, Part II., p. 148; end of Part IV., pp. 496, 497.

In reference to a lost Faculty, *Halliday v. Phillips*, L. R. 23 Q. B. Div. 52; *Fuller v. Lane*, 2 Addams, 431; *Knapp v. Parishioners of St. Mary, Willesden*, 2 Robertson's Rep. 365.

He examined Sir Francis Geary, Mr. H. T. Burke (Somerset Herald), and Mr. Neville Montgomery Geary.

Atlay in reply (*a*).

Cur. adv. vult.

(*a*) The general law relating to chancels was fully considered by the Court of Queen's Bench in *Griffin v. Dighton and Davies* (5 Best & Smith, 108; 33 L. J. Q. B. 29—on appeal, 181), and was clearly laid down by the Lord Chief Justice Cockburn in delivering the judgment of the Court—which was affirmed, on appeal, by the Court of Exchequer Chamber. As this judgment has a material bearing on points raised in the present case, the greater portion of it is here given at length. The plaintiff in that case, as lay rector of the parish, claimed the exclusive control of a door leading from the churchyard into the chancel. The vicar disputed his right, and had the door forced open, for which the plaintiff sued him for trespass. On the argument the case for the plaintiff (the Lord Chief Justice said) was put on two grounds:—“First, it was contended that the freehold of a church being in the rector, the right of possession followed; and, consequently, that, as against a rector, even the incumbent minister would have, at common law, no right to the possession of the church, even for the special purposes to which it is appropriated, such use being capable of being enforced in the Spiritual Court alone; that consequently a rector has alone the right to the control of the doors of the edifice, and is bound to open them only so far as necessity might require, or his own discretion might suggest; and whence it would follow that the ministers and churchwardens would be guilty of trespass if, against the will of the rector, they forced open a door of the church, even for the purposes of ministration. Secondly, if this position should be found untenable as regards the whole body of the edifice, it was contended that, at all events, the chancel was peculiarly appropriated to the rector, and that, subject to its use in the administration of the Holy Communion and the celebration of marriage, the possession of this part of the church must be taken to belong exclusively to him.”

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"We are of opinion that neither of these positions is tenable, and that a lay rector has not, as against the vicar, any right to the possession or control either of the body of the church or of the chancel."

"We are also of opinion that, in this respect, there is no distinction between the body of the church and the chancel. In the case of *Clifford v. Wicks*, 1 B. & Ald. at p. 507, Holroyd, J., says, 'The rector has the freehold in the chancel in the same manner as he has in the church and churchyard;'^{*} and we are of opinion that a rector has no more right or interest in the chancel than he has in any part of the church. The notion that the chancel is part of the rector's glebe, though entertained by Lord Coke ('My Lord Coke said, In the chancel the freehold is in the parson, and it is a part of his glebe': Bro. & Gold. 45), is now exploded. It is true that the rector is bound to repair the chancel; but this arises, not from his having any peculiar property or interest therein, but by the custom of the realm.—Com. Dig. tit. 'Esglise' (G. 2.) Probably this custom had its origin in the fact that the nave, or body of the church, was appropriated to the parishioners, while the chancel was appropriated to the performance of the holy offices, and the seats of the ministers. Originally repairs both of nave and chancel were defrayed out of the tithes, but in process of time the clergy succeeded in inducing the laity to take upon them the burden of repairing that portion of the church which was allotted to them. To induce them to undertake to repair the chancel, in which the clergy and their assistants had their places, would, of course, have been a matter of much greater difficulty. Moreover, the liability of the rector to repair the chancel is not universal. It is said that where there are both rector and vicar in the same church, they shall, there being no custom to the contrary, contribute to the repair of the chancel in proportion to their benefice—Rogers' Ecclesiastical Law, 159, citing Lyndw. 253; or if there be a perpetual vicar, the repairs may be cast upon him—Com. Dig. tit. 'Esglise' (G. 2). Nor does the general right of a rector to have a pew in the chancel carry with it any further consequence, as relates to any peculiar right or interest in that part of the church. Originally vicars had the like right. 'The right of a seat in the chancel,' says Burn (Ecclesiastical Law, tit. 'Church,' sect. vii. par. 13), 'was originally in every vicar.' Further on he says, 'It is a very groundless notion with impropiators that they have the same right in the great chancel that a nobleman hath in a lesser. These lesser chancels are supposed by lawyers to have been erected for the sole use of these noble persons; whereas it is clear the great

^{*} In vicarages the freehold of the church and churchyard is now generally in the vicar. In perpetual curacies it is in the lay impropiators.—T. H. T.

Dr. TRISTRAM (Commissary-General).—The decision of this case (*a*) involves questions of first impression, and also one of jurisdiction.

In the parish church of West Peckham, in the county of Kent, which is composed of a nave, a chancel, and a north aisle, chiefly of the date of the 13th or early part of the 14th century, there is at the east end of the north aisle a freehold Gothic chapel, known as the Geary chapel, which, since its erection in the 14th century, has belonged, as far as can be traced, to the owners of Oxenhoath in that parish, now the seat of Sir Francis Geary, Baronet.

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chancels were originally for the use of clergy and people ; but especially for the celebration of the Eucharist, and other public offices of religion, there to be performed by the curate and his assistants. That the parsons repair these great chancels doth not at all prove their sole right to them ; for they were bound originally to repair the church as well as the chancel ; and of common right the repairs of the church are still in the parson ; it is custom only that eases them of this burden. The Ordinary hath no power to order morning or evening prayer to be said in noblemen's chancels ; but he can order them to be said in the great chancel.' There appears to be no doubt that the jurisdiction of the Ordinary, for the benefit of the parishioners, extends to the chancel as well as the church. Gibson says 'that the seats in the chancel are under the disposition of the Ordinary in like manner as those in the body of the church, which,' he says, 'needs only to be mentioned, because there can be no real ground for exempting it from the power of the Ordinary, since the freehold of the church is as much in the parson as the freehold of the chancel ; but this hinders not the authority of the Ordinary in the church, and therefore not in the chancel.' (Cod. Jur. Eccl. Angl. p. 200, 2nd edit.) In *Clifford v. Wicks*, 1 B. & Ald. at p. 506, Bayley, J., says, 'The general rule is that the rector is entitled to the principal pew in the chancel ; but that the Ordinary may grant permission to other persons to have pews there.'"

(*a*) The delivery of the judgment was necessarily delayed owing to the Commissary-General, a few days after the hearing, having been inhibited for upwards of three months from exercising jurisdiction, consequent on the Archbishop of Canterbury's visitation of the diocese.

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The only present mode of access from the chapel into the church is by a flight of stone steps, leading into the chancel, and erected about 200 years ago, the last four steps being actually within the chancel; and one question raised before the Court was, whether it has jurisdiction, for the purpose of authorizing by a Faculty the restoration of the chancel on an approved plan, to order by the Faculty, in the interests of the parishioners, the removal from the chancel of these four steps, substituting for the present entrance into the chancel one equally convenient in the north aisle.

The main contention of the counsel for the defendants, who are Sir Francis Geary, the tenant for life of Oxenhoath, and the trustees of his family property, on this point was, that this entrance into the chancel was a *right of way incident to their freehold chapel*; that the four steps could not be removed without their consent, which they declined to give; and that as this issue related to a freehold interest in respect of land, its determination belonged to the Civil, and not to the Ecclesiastical Courts.

The Interveners, who are applying for this Faculty, are Mr. Dalison, of Hamptons, a resident landed proprietor in the parish, and his daughter-in-law, Mrs. Maximilian Dalison, as guardian of her infant son, the next in the entail to the Dalison estates, and as having the control of a fund which she is prepared to expend in the restoration of the east end of the chancel, in accordance with the plan referred to; and the contention of their counsel was, that an order for the removal of the four steps, if accompanied with an order providing another convenient mode of access from the chapel into the church, was one which the Court, in the interests of the parishioners, had jurisdiction to include in the Faculty,

and that the doctrines of the Common Law relating to rights of way annexed to freeholds were inapplicable to the present case.

The Court will now state shortly the facts, as proved or admitted in evidence at the hearing, in so far as they are material for the due consideration of the questions of law arising in this suit.

This church is admitted to be in a most dilapidated condition, and to have been so for many years. Some twenty years ago a movement was set on foot for its restoration, which remained in abeyance until last year. There are no funds applicable for the restoration of the nave and north aisle, except such as may be raised by voluntary contributions.

The impropiators of the great tithes are responsible for the fitting restoration of the chancel. The Prior and Convent of Leeds in Kent were the impropiators from 14 Ed. I. to the Reformation. On the dissolution of the convent in the reign of Henry VIII. the great tithes were granted to the Dean and Chapter of Rochester, who during the last 300 years leased them, and their lessees were generally the owners of Oxenhoath. Sir Francis Geary in his evidence states that for 300 years his predecessors in title were lessees of the great tithes of West Peckham, excepting in the case of the leases granted to Mr. Stonehouse in 1638, and to Mr. Francis Geary in 1776; but it is stated in Hasled's History of Kent that he took this lease as trustee for his second son, William Geary, the owner of Oxenhoath.

By the covenants of these leases, in accordance with practice, the lessees were bound to keep the chancel in repair, and, during the continuance of such leases, lessees are regarded in law as rectors of the parish, and as such

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are entitled to the chief pew in the chancel, and to all other rectorial rights or privileges in respect of the chancel.

In 1886 Sir Francis Geary's lease of the rectory expired, and was not renewed, and it thereupon reverted to the Ecclesiastical Commissioners, who now occupy the position of rectors, and, as such, are liable for the repairs and restoration of the chancel.

Mrs. Maximilian Dalison has offered to relieve them of this responsibility in regard to the east end of it, and the restoration of this portion has been assigned to her by the Commissioners. Mr. Bodley, an architect of large experience in the restoration and building of churches, has prepared a plan for its restoration, marked AA, annexed to the answer filed by the Interveners.

The space within the present communion rails is inconveniently cramped, and Mr. Bodley's plan places the new rails further west than the four steps, thus necessitating their removal. In his judgment this is the only position where the rails could, with propriety, be placed, having regard to architectural dignity, and effect, and to the convenience of the officiating clergy. The Ecclesiastical Commissioners have, through Lord Stanhope, assented to the plan. Mrs. Dalison accepts it, and offers to devote to the restoration of that portion of the chancel assigned to her, subject to the plan being adopted, a fund subscribed to erect a memorial to her husband, Lieutenant Maximilian Dalison, of the First Battalion of the Scots Guards, who fell in action at Kasheen, near Suakim, on the 20th of March, 1885, when serving with the Second Battalion. He was the eldest son of Mr. Dalison, of Hamptons, and had taken a warm interest in the proposed restoration of the church

of this parish, in which his family had been settled for three centuries. The fund amounts to about 1,000*l.*, and is the contribution of his brother officers in the Scots Guards, and other officers, the tenants and cottagers on the family estates in Kent and Lincolnshire, many parishioners of West Peckham, and members of his family and friends; and was subscribed with a view to erect a memorial to him in connection with the restoration of West Peckham Church.

On the 19th of July last, at the conclusion of the hearing of this case, the Court decreed a Faculty for the restoration of the nave and north aisle, and the west end of the chancel, reserving judgment on the application for a Faculty for the restoration of the east end of the chancel. It considers that the plan proposed by Mr. and Mrs. Dalison for the restoration of this part of the chancel is, on its merits, entitled to its sanction, and under the circumstances its inclination would be to grant a Faculty to give effect to their wishes, if it can do so without interfering with the legal rights of the owners of the Geary Chapel.

In considering these rights, the position and original condition of the chapel, the subsequent alterations made in it, and the dates when they were made, are material. The chapel is situated at the east end of the north aisle, and is parallel with, and abuts on the north side of the chancel, from which it is separated by two arches of the date of the 13th or early part of the 14th Century. Prior to the Reformation there was no external entrance to the chapel, the entrance then being from the north aisle. There would also be an entrance through the chancel arches, but not the ordinary one, or one as of right, as in pre-Reformation times the great chancel of

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a church was reserved for the use of the clergy exclusively.

Since the Reformation there appear to have been three important alterations made in the chapel:—

- (1) Some time anterior to Queen Anne's reign a raised vault and tomb, four feet high, was erected in the western portion of it, entirely blocking up the old entrance from the north aisle.
- (2) An external entrance, for the purpose of access to the chapel from the churchyard, was made by the insertion of a modern door in the eastern wall of the chapel.
- (3) In Queen Anne's reign, or a little earlier, a square pew, with sittings for ten persons, was erected upon the raised tomb in the western portion of the chapel, and for the purpose of its construction a great portion of the western chancel arch was cut away, and a wooden plastered beam placed across the upper part of it. To enable persons to enter the pew from the interior of the chapel, a flight of steps was erected leading up from the interior to a platform outside the pew door; and to enable them to enter the church direct from the pew or chapel, another flight of steps was erected leading down from this platform into the chancel, the four lower steps being within the chancel proper.

The date of these alterations is fixed by Mr. Bodley, the accuracy of whose evidence on these points was not questioned by Sir Francis Geary's counsel at the hearing; and his opinion, as to the date of the erection of the

steps leading into the chancel, is, to some extent, confirmed by evidence produced by the defendants.

It appears that this flight of steps is in part composed of old memorial stones, and, according to the evidence of Mr. Burke (*Somerset Herald*), and of Mr. Neville Geary, on two of these steps there are the arms of two gentlemen who successively married a daughter and co-heiress of Richard Colepeper, owner of Oxenhoath, and who succeeded to it on her father's death, and that the Colepeper Arms are to be found on two other of the steps.

The reasonable supposition is that these memorial stones were cut up and utilized as steps not by a member of the Colepeper family, who were in possession of Oxenhoath before and from 7 Henry IV. up to the time of James I. (see 2 Halsted's *History of Kent*, p. 258, which is in evidence by consent), but by one of their successors in title, who took no interest in the family memorials of the Colepepers. Their immediate successors, but for a short period only, were Sir John Chowne, Baronet, his son and grandson. The latter sold the property to Nicholas Miller in 1626, with whose descendants it has since remained, in the male line up to 1714, when Sir Borlace Miller, Bart., died without issue, and it then passed to his sister Elizabeth Miller, who married Leonard Bartholomew; and in 1757 it passed under the will of his grandson, Leonard Bartholomew, to William Geary, son of his sister, Elizabeth Bartholomew, by Francis Geary, and a lineal ancestor of Sir Francis Geary, the defendant.

The alterations in the chapel were consequently made when the Millers were owners of Oxenhoath, and as the owners of Oxenhoath were, from 1667 up to 1886, as

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appears by leases produced by the Ecclesiastical Commissioners, also lessees of the rectory, the chancel was, at the time of the erection of the steps, and continued to be up to 1886, more or less under the control of the owners of Oxenhoath as rectors. Upon the importance of this circumstance the Court will presently advert when considering the points of law arising in the case.

The counsel for the defendants advanced the six following propositions of law, all or any of which, if established, he contended would be fatal to the application of the interveners for a Faculty involving the removal of the steps from the chancel :—

1. That the entrance into the chancel was an ancient right of way incident to their freehold.
2. That this right of way had been acquired by a grant which the Court was bound to presume to have been lost.
3. That it was a right of way necessary for the use of the chapel.
4. That, under the Statute of Limitations, the owners of the chapel had acquired a good title to the freehold of the space on which the four steps stood.
5. That they had acquired a right of way by these steps under the Prescription Act.
6. That they had acquired this right of way by a Faculty originally, which the Court was bound to presume to have been lost.

Before considering in detail these propositions, it will be convenient that the Court should direct attention to the law which regulates chancels, as well as to certain principles and rules of Ecclesiastical Law and Practice

more or less applicable to the questions raised by the defendants.

Prior to the Reformation rectories were invariably vested in an Ecclesiastical Corporation, aggregate or sole. In some parishes the parochial clergyman was rector. In very many parishes the rectory was annexed to a religious house or to a church dignity, and the parish was served by a vicar as a substitute for the rector.

The great chancel of the church was part and parcel of the rectory. The freehold of the chancel was, as it still is, in the rector for the time being, the fee being in perpetual abeyance, just as the freehold of the body of the church is in the vicar for the time being, whilst the fee is in abeyance.

The duties of the rector were to provide for the services of the church and to keep the chancel in proper repair, and its use was reserved for the clergy exclusively. It was the sanctuary in which the ceremonies of the Mass were performed, as well as all the other services of the church (2 Phillimore's Ecclesiastical Law, 1808), and the rector, whether the rectory was appropriate or inappropriate, as the chief ecclesiastic of the parish when he attended service, would naturally occupy the chief seat in the chancel.

Rectories which had been appropriated to religious houses on their dissolution at the time of the Reformation were granted, in some instances, to ecclesiastical corporations, but in very many instances to laymen, subject to their antecedent liability for the maintenance and reparation of the chancel.

With the Reformation, and the alterations then made in the services of the Church, there were corresponding alterations introduced in respect of the use and disposition

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of the chancel. The chancel was no longer required for the exclusive use of the clergy, and the ordering of it, as in the case of the body of the church, belonged to the Ordinary, who in such matters is the Chancellor of the Diocese, as Judge of the Bishop's Consistory. The eastern portion of it was reserved as a convenient site for the Communion Table, with a space adjacent to it sufficient for the performance of such services as were still performed there, and the remainder of it, when required, was appropriated for the seating of the parishioners. But the rector, whether he was an ecclesiastic or a layman, still retained the chief seat in the chancel, to which all rectors were entitled prior to the Reformation, and to this right there was conceded to him, first by comity, and afterwards by practice, the principal pew in the chancel for the use of his family as well as of himself, when they attended the services of the church.

But the power of the Chancellor in the ordering of the chancel was, as it still is, subject to limitation.

In the exercise of it he must conform to the procedure prescribed in such cases by Ecclesiastical Law. He is not entitled to move in the matter *ex mero motu*. An application must be made to him for the intervention of his Court by a party having an interest in the matter, and he can make no order without first giving the rector, vicar, and parishioners by citation an opportunity of opposing the application, and the order must be by a decree of his Court, and is subject to be reviewed by the Ecclesiastical Courts of Appeal.

He cannot by his decree, even with the concurrence of the rector and the parishioners, alienate the freehold of any portion of the chancel any more than he can, with

the consent of the vicar and parishioners, alienate any portion of the freehold of the body of the church or of the churchyard.

He may by a Faculty grant leave to a parishioner to erect a pew on a certain space in the chancel, just as he may grant leave to him to erect one on a space in the body of the church, or to erect a vault on a space of ground in the churchyard, or as he can, by a recent practice, grant leave by a special Faculty to a public body to add a portion of a closed churchyard to a highway, and to use it as a public path or highway, so long as it may be required for that purpose, the freehold in each case remaining in the rector or vicar. But Faculty pews have for many years rarely been granted, and then only in return for a valuable consideration, such as in exchange for the chief pew in the chancel, when the site of it is required for the choir, or in exchange for a freehold chapel, aisle, or pew, the use of which the owner has consented to give to the parish, or to a parishioner who has enlarged the church at his own expense, or to perfect an equitable title which has remained imperfect for want of a previous Faculty; the latter practice having received the sanction of the Lord Chief Justice (Lord Coleridge), in the Louth Case, *Bennett v. Faussett and another*, 3 Times Law Reports, p. 736.

In all such grants the freehold of the site in question still remains in the rector or vicar, and in the case of Faculty pews, or Faculty vaults, if the space of ground occupied by the pew or vault, owing to a change of circumstances in the parish, is required for the enlargement of the church, or is required for the fitting, restoration or re-arrangement of the church, the Ordinary has jurisdiction to order, by Faculty (but at the expense of

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the applicant for the Faculty), the removal of the framework and fittings of the pew, or of the vault, to another suitable position in the church or churchyard, consulting, as far as practicable, in the selection of the new site for the pew or vault, and in the carrying out of the order, the wishes of the family interested. The reason for this rule of practice is, that the Ordinary at the time of granting the Faculty cannot forecast whether the space of ground selected by the applicant, as the site for his Faculty pew or vault, may not in the course of time be imperatively required for the use of the parishioners, and the granting of such a Faculty is therefore always accompanied by a reservation, expressed or implied, of the jurisdiction of the Court to change the site, under the circumstances and in the manner mentioned. The act of the Ordinary, in thus sanctioning the removal of the framework of a Faculty pew, or of a vault, to another site, does not amount to the revocation of the original Faculty, but is an order supplemental to it, rendered imperative by a change of times and circumstances. In a Faculty granting a pew the operative words in the London precedents are, "We hereby grant to A. B. our leave and licence or Faculty to erect and build a pew on a space of ground" (describing the position and giving its measurements), "to sit, stand, and hear Divine service and sermons, and for appropriating and confirming the same to himself and family so long as he or they shall continue parishioners and inhabitants of the same parish." There is here no grant of the freehold, or of the space of ground, or of the continuance of the pew on that particular space in perpetuity.

The Court will now proceed to consider the points of law made in opposition to the Faculty.

The evidence establishes to its satisfaction, that the owners of this chapel have from the time of its foundation been entitled by Ecclesiastical, as well as by Common Law, to a right of way in and out of the chapel from some part of the church; but that this way is by way of the north aisle, and not by way of the chancel.

For the first 400 years after its erection there was no external door in the chapel, and there could, therefore, during that period have been access to it only through the church, and without such access the chapel was useless, and the owners would, therefore, be entitled to some way through the church into the chapel as of necessity.

The erection of the chapel was in the 14th century, and was probably coeval with that of the north aisle. It is not an improbable supposition, that the then owner of Oxenhoath built the north aisle, and that in consideration of his having done so he was allowed to appropriate the east end of it as a private chapel, and to erect a private altar in it. This supposition receives confirmation from an inscription on a monument erected by Sir Nicholas Miller in the chapel about 1658, the commencement of which runs as follows:—"Within this asle, anciently belonging to the proprietors of Oxenhoath Place in this parish, lyes interred the body of Sir Nicholas Miller, Kt., owner thereof. He departed this life 20th of February, 1658." According to this inscription the whole aisle, and not the chapel, had always belonged to the proprietors of Oxenhoath, and, if so, their natural right of way to the chapel would be through their own private aisle. The aisle, as was often the case, may have been since given over to the parish by a subsequent owner, in consideration of its being kept in repair out of the church rates, reserving the chapel. The Court has

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come to the conclusion that, either in this way, or by a lost grant, or as a way of necessity, there has been a right of way in and out of the chapel from the north aisle from its foundation up to the present time.

The objection to their claim to have a right of way in and out of the chapel through the chancel under a lost grant is as follows:—

The present chancel and nave, which are of the date of the 13th or the early part of the 14th century, were built on the site of an older church, part of which was incorporated in the new church, as there is a Norman window in the nave. The chancel and nave of the new church would, therefore, be erected on consecrated ground, and the chancel of the old church would be comprised in the chancel of the new one, according to the rule invariably observed in the rebuilding of churches in those days, and which has been continued up to the present time.

The architectural evidence also points to the chancel and nave having been erected before the chapel was built, but whether this be so or not the chancel of the new church stands on ground consecrated long prior to the fourteenth century, and it would, therefore, be under the jurisdiction of the Archbishop's Court, and could not at the date of the erection of the chapel be the subject of a Common Law grant in respect of a right of way through it.

The only person who could have jurisdiction to grant to the owners of Oxenhoath leave to pass through the chancel to the chapel would have been the judge of the Archbishop's Court, but the supposition that the Archbishop's Court by a Faculty would have authorized the owners of Oxenhoath, their families and domestics, men

and women, to pass in and out of the sanctuary when the clergy were celebrating the Mass, and performing the other services of the Church, whenever they wanted to go in or out of the chapel, is so irreconcilable with the religious feelings and manners of those times that the Court cannot entertain it.

It was argued for the defendants that it was not competent to the Court to change a way of access, which had existed as a way of necessity for 200 years, their counsel relying on *Pearson v. Spencer*, 1 Best & Smith, 584, in support of this contention. But the facts of that case do not correspond with those of the present one. In that case the testator died possessed of a farm, which by his will he divided into two farms—A. and B.—and devised A. to his son Abraham, and B., which landlocked A., to his son John. On his death, a particular way was accepted by both the sons as the way from farm A. through farm B., and John afterwards substituted for this way another one, which he said was equally convenient. Abraham contested his right to change a way of necessity once established, and Lord Blackburn, in delivering the judgment of the Court of Queen's Bench, which was affirmed on appeal, said: "We do not feel inclined to hold that the person into whose possession the servient tenement comes, may from time to time vary the direction of the way of necessity, at his pleasure, so long as he substitutes a convenient way. We think that we must hold that the way of necessity, once created, must remain the same way as long as it continues at all."

Here the way of necessity through the chancel was first created some 200 years ago by the then owner of the chapel, by his own act and for his own convenience,

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blocking up the natural and original way through the aisle with a tomb and a pew, which he erected on his own freehold, over which this Court had no control—thereby altering the old way of necessity and creating a new one by his own act, which, according to the above decision, he was not entitled to do.

Again, the freehold of the space in the chancel on which the four steps are placed is claimed to be the freehold of Sir Francis Geary under the Statute of Limitations. To this claim the answer is, that neither the present nor any of the previous Statutes of Limitation have ever been held to apply to consecrated land, the freehold of which is vested in a rector or vicar in trust for the parishioners. Their application is limited to real estate alienable by the owner, and to the extent of his interest in it only. But there is no power vested either in the rector, vicar, or chancellor, separately or conjointly, to alienate such land. This can only be done by Act of Parliament.

A right of way by these steps was also claimed for the defendants under the Prescription Act.

This point I raised in the Arches Court, as counsel for the appellant, in *Crisp v. Martin*, L. R. 2 P. D. 15, in which the appellant claimed a pew in the nave of a church, on the presumption that it had been granted to a predecessor in title by a Faculty which had been lost, and also under the special words of the Prescription Act, 2 & 3 Will. 4, c. 71. On the second ground, Lord Penzance held that the Prescription Act did not apply to a claim to a pew in the nave of a parish church, adding, "The Prescription Act was not intended to alter the law with regard to what was required to make out a prescription, except in this respect, that the time of

prescription was to run back to a much shorter period than to the time of Richard II."

If the Prescription Act does not apply to a claim to a pew in the nave of a church, it cannot apply to the claim of a right of way through a chancel.

The last point advanced for the defendants was that they had acquired a right of way by these steps under a lost Faculty.

The Court, having regard to the former practice of the Ecclesiastical Courts as to the granting of Faculties, coupled with the fact that at the time when these steps were placed in the chancel by the then owner of Oxenhoath, he also occupied the position of rector, and was liable for the repairs of the chancel, is of opinion that he was justified in placing the steps there without a Faculty, and that an application for a Faculty under the circumstances would have been an unusual precaution. The space occupied by the steps does not appear at that time to have been required by the Ordinary, either for rearranging the chancel for the services of the church, or for the seating of the parishioners. Had a Faculty been necessary, the steps having been there in use for 200 years, the Court would, under the circumstances, have presumed that one had been granted, though not forthcoming.

But whether the steps were placed there under the authority of the rector alone, or of a Faculty, they must be held to have been placed there subservient to the future requirements of the parishioners, and liable to be removed whenever the space they occupy should be wanted in the interests of the parish, on equitable and reasonable terms.

There was filed with the petition a plan for the restora-

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tion of this part of the chancel, somewhat different from the one now before the Court, which was abandoned by the defendants and interveners before the hearing, and the only plan now before the Court is the plan marked A A.

The Court, having already intimated that it considered that this plan, on the evidence, was entitled to its sanction, is prepared to decree a Faculty to Mr. and Mrs. Maximilian Dalison as representing the Ecclesiastical Commissioners, authorizing them to carry out the restoration of the east end of the chancel in accordance with this plan, with an authority to remove the four steps, if it has jurisdiction to order their removal, subject to a proviso that they construct a staircase leading from the Geary pew into the north aisle, on one of the three plans pointed out by Mr. Bodley in his evidence, or on any other plan approved of by the Court that Sir Francis Geary may suggest, with liberty to Sir Francis Geary to erect the staircase himself, the costs of the erection of the staircase, and of the alterations in the Geary pew incident thereto, to be part of the costs of the restoration of the east end of the chancel, and not to be borne by Sir Francis Geary.

As to the costs of the suit, the question raised by the defendants was a novel one, and a very proper one for argument. The case was temperately and ably argued by counsel on both sides. Sir Francis Geary and Mr. Dalison stated in evidence that they wished it to be understood, that the present suit had in no way impaired their lifelong friendship, and under these circumstances the Court proposes to make no order as to the costs of this suit, thus leaving each party to bear their own costs.

There remains for consideration the question whether

this Court has jurisdiction to decree a Faculty for the restoration of the east end of the chancel, which shall include a leave or licence for the removal of the four steps in question.

An Ecclesiastical Court has no jurisdiction to try a suit directly in respect of title to freehold; but it is laid down in 3 Burn's Ecclesiastical Law, by Phillimore, p. 389, that in case the principal matter of the "suit belongs to its cognizance, all matters incidental (though otherwise of a temporal nature) are also cognizable there, and no prohibition will lie, provided they proceed in the trial of such temporal incident according to the rules of temporal law." And Lord Holt, in *Shotter v. Friend*, 2 Salkeld, p. 547, says:—"Where the Ecclesiastical Courts have cognizance of the original matter, and an incident happens which is of temporal cognizance, or triable by the Common Law, they shall try the incident, but must try it as the Common Law would. Thus, in a suit for tithes or for a legacy, if the defendant pleads a release or payment; or in a suit to prove a will, if the defendant pleads a revocation. So in a case at bar. They shall try the matter of payment or no payment; but then they must admit such proof as the Common Law would, or otherwise they reject the cause themselves, and ought to be prohibited." See also *Gould v. Gapper*, 5 East, 545.

The present suit is a Faculty suit, instituted for the purpose of obtaining a Faculty or Faculties from this Court to authorize the restoration of a parish church, including the great chancel, on certain plans approved of by the Court. To carry out the plan for the restoration of the east end of the chancel, it appears that it will be necessary for the Court to direct the removal of four

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steps placed within the chancel and leading from the Geary pew; as if they remain the access from the pew and chapel for the family and domestic servants of Oxenhoath into the chancel would be within the communion rails—a state of things for which there is no precedent, and for which the Court would not be justified in making one.

The question, whether the Court shall or shall not direct the removal of these steps, is incidental to the principal matter of this suit. It has been tried on oral evidence and in all respects according to the principles of the Common Law, and the Court has therefore, on the authorities cited, if applicable to the present case, jurisdiction to try it.

As the counsel for the defendants has intimated that it is intended to apply for a prohibition, the Court, in accordance with the practice of the Consistory Court of London in such cases, having intimated what its order will be—assuming that it has jurisdiction to order the removal of the steps—directs this cause to stand over for sentence until the 25th of January, 1890.

The Queen's Bench Division having granted a Rule *Nisi* for a prohibition, and the Interveners having given notice in the Registry that they did not propose to incur the expense of contesting the matter in the Courts of Common Law, or to show cause against the Rule being made absolute, the judge dismissed their application for the Faculty.

COMMISSARY COURT OF CANTERBURY.

HARRY W. LEE (as Secretary of the Archbishop of
Canterbury)

v.

THE VICAR AND CHURCHWARDENS OF HERNE.

(The Herne Faculty Case.)

*Deviation from a Plan sanctioned by Faculty—Contempt of Court—
Practice—Leave of Court required for Deviation—Costs.*

A Faculty issued for the restoration of Herne Church in accordance with a plan filed in the registry. In the church there was an old chapel, separated from the nave by two arches, which, by the plan, were to be retained without alteration. In the restoration two additional arches with heavy corbels over the old arches, and a large capital, pillar, and base leading into the nave had been introduced, neither of which additions were shown on the plan. A citation having issued at the instance of the secretary of the Archbishop of Canterbury, calling upon the vicar and churchwardens to show cause why they should not be monished to comply with the provisions of the Faculty, or to submit to such other order as the Court might think fit to make upon them in the premises,

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(1) *Held*, that by allowing the deviations complained of to be made without the leave of the Court, the vicar and churchwardens had been guilty of a contempt of Court.

(2) That no deviation from the plans sanctioned by a Faculty can lawfully be made without the sanction of the Court.

(3) That, under the circumstances, the Court would dispense with making the usual order requiring the vicar and churchwardens to restore the chapel to the condition sanctioned by the Faculty; but to mark its disapproval of their infraction of the law, condemned them in costs.

In this case a citation had been issued on the application of Mr. Harry W. Lee, as legal diocesan secretary to the

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Archbishop of Canterbury, calling upon the vicar and churchwardens of the parish of Herne, in Kent, to show cause why a monition should not issue, requiring them to comply with the provisions of a Faculty granted for the restoration of the parish church, or to submit to such order as the Court might think fit to make, it being alleged that there had been a deviation from the directions contained in the Faculty in certain particulars—namely, in the insertion in the Milles Chapel of two solid arches with heavy corbels, and in the insertion in the same chapel of a large capital, pillar, and base. The matter now came on for hearing.

The Archbishop's secretary was represented by *Hugh Lee*, solicitor, and the Respondents by *Scott*, solicitor.

On January 6, 1891, a Faculty was issued from the Court to the vicar and churchwardens of Herne authorizing them to carry out certain works with a view to restore the parish church. Plans had been submitted to the Archbishop and to the Court at the time, and, subject to these plans being adhered to, the Faculty was granted. When the restoration was commenced it was found that certain difficulties arose, and to overcome them considerable deviations were made from the plans on which the Faculty was granted. His Grace the Archbishop of Canterbury having after the completion of the restoration of the church inspected it, and observing deviations from the plans, eventually compared them with the alterations, and, finding that there had been serious deviations from the plans, felt it to be his duty to bring the matter to the notice of this Court. The fabric of the church was entirely under the jurisdiction of this Court. The

alterations were as follows :—There were inserted in the Milles Chapel two solid arches with heavy corbels, and a large capital, pillar, and base. These were the grounds on which this suit was instituted. The citation was served upon the defendants, who had entered an appearance and filed an answer to it, but afterwards through their solicitors informed the Court that they admitted the allegations made by the promoters.

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Scott, for the Defendants, stated his clients had not knowingly or wilfully contravened the terms of the Faculty, and that, if the works specified in the citation were not in accordance with or deviated from the Faculty, such deviation was not material, and was reasonable, and properly incident to the completion of the work.

Evidence was given by the vicar and churchwardens, and by another witness. The churchwardens stated that they did not know of the alterations until after they had been made.

Dr. TRISTRAM.—On January 6, 1891, a Faculty issued from this Court to the vicar and churchwardens of the parish of Herne, in the county of Kent, authorizing them to effect the restoration of the parish church in accordance with a plan prepared by an architect and filed in the registry. Previously to the application for the Faculty the plan had been submitted to, and approved of by, the parish vestry and the Archbishop of Canterbury, and, there being no opposition to the Faculty, it issued as of course. In the autumn of last year it came to the knowledge of his Grace that in the restoration of a chapel in the church called the Milles Chapel

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there had been an important deviation from the original plan. The chapel was separated from the nave by two arches, which, by the plan sanctioned, were to be retained without further alteration. The main alterations to the plan sanctioned were the insertion of two additional solid arches with heavy corbels over the old arches, and the erection of a large capital, pillar, and base leading into the nave, neither of which were shown by the plan. His Grace, upon being satisfied that the deviations mentioned had been actually made, authorized Mr. Lee, his legal diocesan secretary, to apply to this Court to issue a citation against the vicar and churchwardens, calling upon them to show cause why a monition should not issue against them, requiring them to comply with the provisions of the Faculty in the matters referred to, or to submit to such order as the Court might think fit to make in the premises. Upon the citation having been issued and served on the vicar and churchwardens they appeared and filed an answer, but subsequently instructed their solicitor to state in writing that they admitted the allegations above mentioned.

These deviations from the plan sanctioned by the Faculty were a manifest contempt of Court; and had his Grace permitted such infractions of the law to be passed over in silence, or if the Ecclesiastical Courts were to allow them to remain uncensured, the ancient rule of law established in the interest of the parishioners, which prohibits alterations being made in a church without the authority of Faculty, would in process of time become nugatory.

The Court is satisfied, upon the evidence, that the churchwardens were unaware of the deviations until they were completed. The insertion of the arches and corbels

was, in the first instance, commenced by the architect without consulting the vicar. The column was inserted at the suggestion of the vicar with a view to give further support to the roof, and reluctantly sanctioned by the architect. Both the architect and vicar were in error in not applying to the Court for its sanction to the deviations from the plan before they were made, but as they did so in ignorance of the law, and as it appears that the insertion of the retaining arches and corbels is in keeping with the other parts of the church, the Court will do no more than point out the error the architect and vicar have fallen into.

The parties must pay the costs incurred in this matter, which will not be heavy, by reason of their admitting the allegations. In the opinion of the Court they ought to be repaid to them by the committee who sanctioned the proceeding. The Court will not pass any censure, as it is satisfied with the explanations which have been given.

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CONSISTORY COURT OF HEREFORD.

THE OFFICE OF THE JUDGE PROMOTED BY HAWKES,
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v.

JONES AND ANOTHER.

*Heating Apparatus introduced without a Faculty—Fabric of Church
endangered—Monition—Condemnation in Costs.*

1888.
January 13.

It was the general wish of the parishioners of Pontesbury that the parish church should be efficiently warmed. A church committee was formed to carry out this object, and the committee adopted a plan of heating the church by a patent apparatus. The churchwardens permitted the patentee to erect the apparatus without a Faculty, and without furnishing them with a plan of the work proposed to be done. On the arrival of the apparatus he found that to introduce the apparatus it would be necessary to pierce the tower of the church, which he did in such a manner as to endanger its safety.

Held, that a Faculty was necessary to authorize the introduction of a heating apparatus or stove in a church, if it involved any interference with the fabric, pews, or the internal fittings of the church, or interference with human remains, and that the churchwardens, for their omission to obtain a Faculty, had rendered themselves liable to a monition and to an order to take necessary measures to put the tower in a state of safety, and to condemnation in costs. Order accordingly.

1887.
December 12.

Jeune appeared for the Promoter.

Statham for the Defendants.

Witnesses were examined and counsel were heard for the parties.

Cur. adv. vult.

Dr. TRISTRAM.—The promoter of this suit, which is criminal in form, is the Rev. Samuel John Hawkes, one of the three rectors of the undivided parish of Pontesbury. The defendants are Mr. Heighway Jones and Mr. Samuel Ruscoe, the churchwardens of the parish. The charges brought against the defendants are—that for the purpose of introducing a warming apparatus into the church, they, without a Faculty, in November, 1886, made an aperture 4 ft. wide and 8 ft. high in the wall of the tower of the church, which was 12 ft. in thickness, and thereby endangered the stability of the tower; and that they also, at the same time and for the same purpose, made certain excavations within and outside the tower, which involved the removal of the bones of corpses buried there, and which had not been properly re-interred. There is a further charge, that owing to the close proximity of the heating apparatus, which they had placed in the excavation in the crypt of the tower, to the floor of the vestry, which was erected over the crypt, it was endangered from fire.

The defendants by their allegation admit, that they did the acts complained of without a Faculty, and that in so far they have committed a breach of Ecclesiastical Law; but they say that the acts done were authorized by them without any intention of violating the law, and they deny that by their action they have either endangered the stability of the tower, or the safety of the vestry by the risk of ignition.

The case, which in some of its particulars is of an unusual character, was heard in this Court on the 12th of December last, when witnesses were examined both for the promoter and for the defendants.

Prior to the opening of the case, Mr. Arnold Statham,

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as counsel for the defendants, applied for leave to amend their pleadings, by inserting a prayer for a Faculty confirmatory of the alterations. Mr. Jeune, as counsel for the promoter, did not oppose the application, which the Court, in the exercise of its discretion, granted.

It appeared in the evidence, that it was the general wish of the parishioners before and in the autumn of 1886, that measures should be taken to warm the church more efficiently than by the stoves with which it was then heated; that a church committee had been appointed to give effect to this object, and that it had accepted a plan proposed by Mr. Joseph Trusswell, a heating apparatus manufacturer at Sheffield, at the cost of 72*l.*, as the most feasible one tendered.

It appeared, however, that Mr. Trusswell, before the acceptance of his tender, had submitted to the church committee or churchwardens no specification of the alterations he proposed to make in the tower or in the church to enable him to fix his patent warming apparatus there; and that, until he inspected the church, which he did for the first time on the morning of his commencing the works, he himself had formed no plan of the alterations that would be required, and that he actually commenced making the aperture in the tower without previous communication with the churchwardens, and that they, in fact, were not aware of what was being done until Mr. Heighway Jones himself saw the men engaged on the tower.

The churchwardens stated, in their evidence, that had they been aware that interference with the fabric of the church would have been required for the introduction of Mr. Trusswell's apparatus, they would not have proceeded without a Faculty, and the Court is satisfied that

they have infringed the law in this matter through inadvertence.

The Court cannot help observing that in this matter the churchwardens have committed three irregularities: firstly, in not having submitted the proposed introduction of a new warming apparatus to a parish vestry duly summoned for the purpose; secondly, in allowing Mr. Trusswell to take possession of, and to commence, any works in the church without their having been furnished with a plan of what precisely he proposed to do; and thirdly, in sanctioning the continuance of the works without first applying for and obtaining a Faculty.

By the action of the churchwardens in thus permitting the alterations in question to have been made without a Faculty, they have committed an undoubted breach of Ecclesiastical Law, and have rendered themselves liable to an adverse sentence of this Court, with condemnation in costs.

It cannot be too generally known that it is an offence against Ecclesiastical Law for a churchwarden, or for any other person, to make, or to authorize the making of any alteration in the fabric, the ornaments, or the substantial fittings of a church, or to remove the remains of the dead, without a Faculty. The introduction of a stove or of a warming apparatus into a church, provided it does not involve interference with the fabric or pews or substantial fittings of the church, or necessitate the removal of remains, or occasion discomfort to any parishioner, might, in the opinion of the Court, with the sanction of the vestry, be effected without a Faculty; but if it involves any interference with the fabric, the pews, or the substantial fittings of the church, or necessitates the removal of remains, or may occasion discomfort to any

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parishioner, a Faculty is required for the protection of the parishioners, as well as for that of the churchwardens.

It is required for the protection of the parishioners, as every parishioner has an interest in his parish church, and is, therefore, entitled to notice of any intended alteration in the church, and to an opportunity of objecting to it in the Consistory Court of his diocese. Notice of the proposed alteration is given to him by the citation of the Court, published on the church door, which precedes the granting of the Faculty, and the opportunity of objecting is afforded to him by his right to appear to the citation. It is required for the protection of the churchwardens, as the Faculty relieves them from all personal liability for acts done under its authority; whereas if a settlement, or other damage, were to result from alterations done to the fabric without a Faculty, they are personally liable to make good the damage. They are also liable, in any event, to be proceeded against by articles in the Ecclesiastical Court for having committed an ecclesiastical offence by acting without a Faculty where a Faculty is required.

The only question for the serious consideration of the Court in this case is, whether it ought, having regard to the evidence, to grant the prayer of the promoter, and order the defendants to restore the tower and church to its former condition, and to remove the heating apparatus and pipes, and to replace the bones and remains as nearly as possible in the place formerly occupied by them, or to grant a Faculty confirmatory of the alterations, on the ground that the new heating apparatus is conducive to the comfort of the parishioners, and may be retained without necessarily endangering the safety of the fabric.

Upon this question the evidence is somewhat conflicting.

Mr. John L. Randal, an architect of lengthened experience, and who is familiar with the history and condition of the church from his having been consulted as architect for the church in 1859, stated that the alterations in the tower have not up to the present time made it worse, but his opinion is that for future safety the portion of the wall removed ought to be reinstated, and that if the stove is to remain in the crypt the floor of the vestry ought to have further protection from its heat.

Mr. Oliver Jones, a builder of considerable experience, who had inspected the church, and was examined for the promoter, although of opinion that the new works had weakened the tower, was yet of opinion that it might be sufficiently strengthened by iron rods being placed along the wall in which the opening was made, and brought through the walls on either side, and fastened outside by knobs.

Mr. Arthur E. L. Oswell, an architect from Shrewsbury, who was examined for the defendants, considered that the alteration had not even endangered the future stability of the tower, and Mr. Trusswell was of the same opinion.

Where the evidence of skilled witnesses on such a point is conflicting, as it is in the present case, and especially where it is based mainly upon opinion, the duty is imposed upon the Court of forming its own conclusion, as best it can, from the evidence and surrounding facts of the case.

It is to be observed that there are no present indications in the tower of its having been injuriously affected

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by the recent alterations, which were made upwards of twelve months ago, and that the probability or possibility of their producing future injury is based solely on the opinion of Mr. Randal.

After consideration, the Court has come to the conclusion—having regard to the size and strength of the tower, the smallness of the aperture made in it, the fact that some small portion of it has been underpinned, and that where the opening has been made it has been strengthened by the construction of an inverted arch—that for its future security it is not essential that the Court should order its restoration to its former state, but that it will be sufficient for all practical purposes if the Court orders that it be further strengthened in such manner as may be approved of by an independent architect, at the same time granting the confirmatory Faculty asked for.

The order of the Court will in this case be as follows :—(1) That the defendants be monished for having sanctioned and permitted the alterations complained of to be made in the tower and in the church, and the removal of remains, without a Faculty, and be condemned in the promoter's just costs: (2) That the defendants be ordered to reverently and decently re-inter the bones or remains of the persons removed in a place or places to be selected under the sanction of the Court: (3) That a Faculty confirmatory of the alterations complained of issue, subject to the Court being satisfied by the report of a competent architect, to be named by itself, that such measures have been taken as are necessary for the future stability of the tower and to save the vestry from all reasonable risks of fire.

I will direct one of the surrogates of the Court to visit

the churchyard and to report to the Court as to the most fitting place in which to re-inter the remains, and I will also give special directions to the architect as to the bearing of the evidence on the subject of the tower and the vestry, in order that every possible precaution may be taken to ensure the future security of the church. The costs incident to the confirmatory Faculty will be paid by the defendants.

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*Chapel of Ease—Parochial Church—Site vested in Duchy of Lancaster
—Sale of Pews to provide Funds for Erection of Church—Invalidity
of Title by Sale—Claim of Purchasers under the circumstances to
Equitable Consideration—Faculties granted to Claimants of Seats by
Purchase, subject to Conditions.*

Harrogate, with Bilton, was formerly a township in the parish of Knaresborough. In June, 1749, a chapel called St. John's Chapel, then recently erected at High Harrogate, in Knaresborough Forest, within the Duchy of Lancaster, was consecrated with a burial ground annexed, with the consent of the lord of the manor, and a majority of the persons interested in the Forest, as a Chapel of Ease to the parish church of Knaresborough. Prior to consecration there was no conveyance of the site for ecclesiastical purposes, and on the division and inclosure of the Forest in 1778, the chapel and burial ground was assigned by the Inclosure Commissioners to the Duchy of Lancaster, the erection of the chapel and consecration being treated by them as

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encroachments on the rights of the Duchy. By letters patent, dated 1791, issued by His Majesty George III. in right of the Duchy, after reciting the aforesaid award of the chapel and burial ground by the Commissioners to the Duchy, and that the chapel required repairing and enlarging, Lord Loughborough, as lessee of the Prebend of Beeth, the vicars of Knaresborough and minister of the chapel for the time being, were appointed trustees or curators of the chapel, and amongst other things were empowered to let or dispose of the pews and seats in the chapel as they should think fit, and out of the proceeds arising therefrom to keep the chapel in repair, with a proviso that the letters patent should remain in force until revoked by other letters of commission under the seal of the Duchy, and on such revocation empowering the Chancellor and Council of the Duchy to revise the rules relating to the chapel. In pursuance of the powers contained in the above letters patent, the trustees enlarged and repaired the chapel, and allotted certain pews in it, subject to the payment of rent, to residents in the chapelry, so long as they should remain residents. In 1828 a district was assigned to the chapel by an Order in Council, made under 58 Geo. III. c. 45, and 59 Geo. III. c. 134, for Ecclesiastical purposes. In December, 1829, by a vote of the vestry of the chapelry, it was determined to erect a church in place of the chapel on the burial ground—the cost of such erection to be paid by voluntary subscriptions, and the sale of pews in the new church. The church was erected, containing 800 free sittings and 415 private sittings, to be sold to meet the deficiency in the building fund. This scheme was approved of by letter by the Duchy, and by the Church Building Commissioners, who contributed £700 towards the building fund. The new church, having been erected, was consecrated in October, 1831, as Christ Church, Harrogate. The amount raised by subscriptions for its erection was £1,973, leaving a balance due to the fund of £2,406 to be defrayed by the sale of pews. Sales of pews were effected up to £624, and the balance, £1,782, was provided by members of the Church Building Committee, to be repaid to them out of future sales of pews. From 1831 to January, 1884, a system of disposing of pews by sale, and of allowing them to devolve as personal property, was continued without objection on the part of the minister or churchwardens. In 1861 two transepts and a chancel were added to the church at the cost of £1,614—of which £1,000 was raised, in accordance with a vote of the vestry, by the sale of twenty-four pews in the transepts. The system of having in the church 400 private sittings, over which the churchwardens could exercise no control for the purpose of seating the congregation, was attended with much inconvenience. The minister and churchwardens, with the sanction of the

vestry, filed a petition for a Faculty to authorize the re-pewing of, and the re-arrangement of the sittings in, the church, securing, however, to the present holders of sittings by purchase their present sittings for a period of twenty-one years, provided they should so long continue parishioners.

A large number of the seat-holders had assented to the scheme of the vestry, but some few of the principal and oldest claimants to the purchased pews opposed the granting of the Faculty in the form prayed, as being an encroachment on their equitable rights.

(1) *Held*, That the sale of pews in and since 1831, upon the facts proved, was not a transaction to which the Court could, by Ecclesiastical Law, give legal effect, and that the pews claimed under the purchase system were now the property of the parish, but subject to the orders of the Court.

(2) That the fee of the site of the church was still vested in the Duchy of Lancaster, and that the Duchy might, in 1831, by revoking the Letters Patent of 1791 in whole or in part, and creating fresh trusts under seal, have given a legal sanction to the system of selling the pews in the new church, as approved of by the vestry; but that the letter from the secretary to the Council, sanctioning the system, was not a good execution of the powers exercised by the letters patent, and was therefore ineffectual for the purpose for which it was intended.

(3) That the Court, being satisfied that the money produced by the sale of the pews had formed a substantial portion of the funds used for the erection of the church, and that the pews had for fifty-four years been sold, transferred, and registered as the private property of individual proprietors with the concurrence of the ministers and churchwardens, was bound to exercise an equitable discretion in framing any order affecting the title of the respondents to these pews.

(4) The Court, under the special circumstances of the case, granted Faculty pews to six out of seven of the claimants in lieu of the pews purchased by them, or by their predecessors in title, upon certain terms, and subject to certain conditions.

The Vicar and Churchwardens of Christchurch, Harrogate, petitioned the Court, with the concurrence of the vestry, to grant to them a Faculty to enable them to re-pew the church and to place four hundred sittings in the church which had hitherto been dealt with and treated as the private property of individuals, some of

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whom were non-parishioners, under the control of the churchwardens, reserving to such of the present holders as were and continued to be parishioners their right to sit in them for twenty-one years from the date of the Faculty. The holders of these pews founded their claim to them on purchase. The present church was erected in 1830 and 1831, in substitution for an old chapel of ease which stood on its site. The fee of the chapel and site of the church was vested in the Duchy of Lancaster. The Duchy had, by Letters Patent dated 1791, placed the chapel under the control of trustees, who were empowered by the letters patent to let and sell a portion of the pews, and out of the income derived therefrom to keep the chapel in repair and to provide for the performance of Divine service in it according to the rites of the Church of England. In the letters patent a power of revoking and altering the same and of making fresh regulations for the chapel was reserved to the Duchy.

In 1829, by a resolution of the vestry of the chapelry, it was determined to build a church on the site of and in substitution for the chapel, and that the Church Building Committee should be empowered to sell four hundred sittings in the new church, with the view of thereby raising funds towards its erection. The Duchy of Lancaster, in a letter written by the Secretary to the Council, approved of this arrangement, but omitted to revoke the Letters Patent of 1791 in whole or in part, and to declare any new trusts relating to the church or its site under the seal of the Duchy. The Church Building Committee sold a certain number of sittings to furnish funds for the building of the church, and the funds furnished by subscription and the sale of these sittings being insufficient to defray the whole cost of its erection, the balance was

advanced by certain members of the committee on the understanding that they were to recoup themselves for the advance, with interest, by future sales of sittings. The sittings sold under the above arrangements had been for the space of fifty-four years dealt with as private property.

There was a register kept in which the names of the proprietors of the sittings were from time to time entered, with a note of the transfers of sittings by sale or otherwise.

In 1861 the vestry determined to enlarge the church by an addition of a north and south transept and the extension of the chancel, and to provide funds for this purpose the Church Building Committee were authorized to sell twenty-four sittings in the transepts. This they did, and raised thereby the sum of a thousand pounds.

This system of appropriation of pews by purchase worked inconveniently, as the churchwardens were thereby prevented from seating the congregation in the sittings when they were unoccupied. It was, therefore, considered advisable by the vestry that there should be an abolition or modification of this system under the sanction of the Court.

The Rev. Thomas Sheepshanks, the owner of considerable household property in Harrogate, and the proprietor of a large number of purchased sittings, with six other proprietors of sittings, objected to their being deprived of their rights upon the terms proposed by the petitioners.

Bayford, Q.C., and *Dibden*, appeared for the Petitioners.

West, for the Rev. Thomas Sheepshanks.

Banks, for the other Interveners.

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Dr. TRISTRAM.—The Vicar and Churchwardens of Christchurch, Harrogate, instituted this suit for the purpose of obtaining a Faculty to authorize them to make extensive alterations in the parish church, as well as to put a stop to the system which has prevailed for upwards of half a century of selling and letting the greater number of the principal pews in the church.

The case was heard on the 19th and 20th of October last. On the evidence I was fully satisfied that it was in the interest of the parishioners that the Faculty, so far as it related to the proposed alterations of the church, should be granted, and I was also satisfied that I was bound by previous decisions to provide in the Faculty for the discontinuance of the system of the selling and letting of the pews in question; but having regard to the circumstances under which it originated, and to the fact that it had received the continuous sanction of the Vicars and Churchwardens of the parish for fifty-four years, and even up to the time immediately preceding the filing of the petition for the Faculty, I felt some difficulty in deciding as to the nature of the order I ought in equity to the claimants to these pews to make, and I therefore reserved my judgment.

The population of the parish of Christchurch is stated to be about 5,000. In the nave and chancel of the church, as at present constructed, there are 746 sittings, of which 316 are free and 430 are appropriated. In the galleries there are 433 sittings, including 93 for children, of which 203 are free and 230 appropriated. The seats are all uncomfortably narrow, the ventilation in some of the pews is bad, and some of the windows are structurally bad. By the alterations as proposed, the sittings in the galleries, many of which are, owing to their discomfort, unoccupied, will be reduced from 433 to 336, all of

which will be comfortable, and the seats in the nave and chancel will be reduced from 746 to 742, also improved in convenience and comfort. The lowest estimate of the costs of these alterations is 1,100*l*. The petitioners ask that provision be made in the Faculty empowering them to allot, amongst such of the claimants to the appropriated seats as are parishioners, seats as near to their present seats as circumstances will permit for the term of twenty-one years, provided they so long continue to reside in the parish and attend the services of the said church.

Seven of the claimants to the pews have appeared in the suit, and have filed acts on petition setting up their titles to the pews now under their control, and praying the Court to protect their rights in any Faculty it may think fit to issue.

Before the Court proceeds to consider the claims set up by the several defendants, it will be convenient to state the circumstances under which these claims have arisen.

Harrogate-with-Bilton was formerly a township situate in the parish of Knaresborough, and is distant three miles from the parish church of Knaresborough. In the middle of the last century it was considered desirable to erect a chapel at High Harrogate, which was then and had for a long time prior thereto been a watering-place of repute, for the convenience of the visitors as well as for that of the inhabitants of the township. On the 18th of June, 1749, a chapel called St. John's Chapel, which had then been recently erected by public subscription on a site in the Forest of Knaresborough, with the consent of the lord of the manor and a majority of the persons interested in the forest, was, together with a burial ground, consecrated as a chapel of ease in the parish of Knaresborough. There

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appears to have been no conveyance of this site for ecclesiastical purposes, prior to the consecration, by the owner, the Duchy of Lancaster, in compliance with a well-established rule of Ecclesiastical Law.

In 1778, the commissioners authorized to divide and enclose the wastes of the Forest of Knaresborough, by their award, assigned to the Duchy of Lancaster St. John's Chapel, with the burial ground, as belonging to the Duchy, treating the erection and consecration of the chapel in 1749 as an encroachment on the rights of the Duchy.

By letters patent dated the 26th of September, 1791, issued by George III. in right of the Duchy of Lancaster, after reciting the erection and the consecration of the said chapel, and the consecration of the burial ground, and that the same since, by the award of the Commissioners appointed by two several Acts of Parliament for dividing and enclosing the wastes of the Forest of Knaresborough, had been awarded to his said Majesty, his heirs and successors, as belonging to the said Duchy, as an encroachment made on the wastes of the said Forest, and after reciting that the said chapel and burying ground required repairing and enlarging, appointed Lord Loughborough, as the lessee of the Prebend of Beeth, and his successors and lessees, and the vicars of Knaresborough and ministers of the said chapel for the time being, as trustees or curators of the said chapel, with power to enlarge the said chapel and burying ground, and to make rules for seating the congregation of the said chapel, and to appoint days and times for the performance of Divine service in the said chapel, and also from time to time, as trustees and curators of the said chapel, to let or dispose of the pews and seats

in the same manner as they, or the major part of them, should think fit, and to appoint a treasurer, or treasurers, to receive and collect the rents which the holders of such pews or seats should assent to give for the same, or the fines or consideration money in gross to be paid for the same, and to lay out the same on the repairs of the said chapel, and for improving and enlarging the said chapel and burying ground, and subject thereto for the forming of a fund for the future repairs of the said chapel. There then follows this proviso: "And we do further will, grant and declare that these our letters shall remain and continue in force and effect until the same shall be revoked and determined by other letters of commission to be awarded forth under the seal of our said Duchy by us, our heirs or successors, and that from and after such revocation and determination hereof it shall and may be lawful for the Chancellor and Council of the said Duchy at any time or times to revise such rules and orders as shall have previously been made under or by virtue of these presents touching or concerning the premises, and to alter, change, or abrogate the same as they shall think fit or expedient."

In pursuance of the powers conferred upon them by the above letters patent, Lord Loughborough and the Vicar of Knaresborough, and the Curate of St. John's Chapel, Harrogate, enlarged, improved, and repaired the said chapel, and allotted certain pews to persons resident in the said chapelry, so long as they should remain resident therein, subject to the payment of certain rents therein named.

The next documentary evidence relating to the said chapel is an Order in Council, dated the 28th of June, 1828, made under the 58th of George III., chapter 45,

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and the 59th of George III., chapter 134, by which the district of Bilton-with-Harrogate was assigned to the said chapel of St. John's, Harrogate, for ecclesiastical purposes.

At a vestry of the inhabitants of Bilton-with-Harrogate, held on the 17th of December, 1829, it was resolved that in lieu of St. John's Chapel, a new church should be erected on the burial ground without any rate on the parishioners, and on the 24th of the same month, at another vestry meeting of the said township, a committee of seven, including the minister of the chapel and the chapelwarden, was appointed to give effect to the resolution of the previous vestry, with power to raise funds for the erection of the new church by voluntary contributions, by application to the Church Building Commissioners, and by the sale of pews in the said church. A plan for the erection of the new church, by which there were to be 800 free sittings, and 415 private sittings to be sold in order to meet the deficiency of funds from other sources, was submitted to and approved of by the Council of the Duchy of Lancaster, and the Duchy subscribed 300*l.* towards the church-building fund, stipulating that the rights (if any) of the tenants of the Duchy to pews in the old chapel should be reserved to them in the new church. This plan was also approved of by the Commissioners for building churches, who contributed 700*l.* towards the fund. It was further resolved by the committee that a register should be kept by a pewholder appointed by the proprietors of pews, and in which their title to the same was to be stated.

The new church was erected in 1830, and was consecrated on the 1st day of October, 1831, as Christ Church, Harrogate, the amount raised by voluntary contributions for the building fund being 1,973*l.* 8*s.* 9*d.*,

leaving a balance of 2,406*l.* 15*s.* 11*d.* to be defrayed by sale of pews.

The amount at this date received by the actual sale of pews was 624*l.*, leaving a balance of 1,782*l.*, which the committee provided, recouping themselves afterwards by the sale of pews to themselves and others, and to some extent out of subsequent subscriptions. It is difficult at this distance of time to ascertain from the accounts with certainty the sum to be credited ultimately against the pews, but the Court is satisfied that a *substantial portion* of the building fund was derived from the sale of pews.

By the sentence of consecration of October 1st, 1831, commissioners were appointed to investigate claims to pews in the chapel, with power to substitute pews in the new church for those held of right in the chapel. The commissioners, however, reported that no claims had been substantiated to any pews in the chapel.

The system of disposing of the pews by sale, and of allowing them to devolve as personal property, was continued from 1831 to January, 1884, without objection taken on the part of the minister, chapelwardens, or parishioners, and in June, 1832, the Court of Chancery actually sanctioned the purchase of a pew for one of its wards, Miss Georgiana Watson, the owner of Bilton Park, Harrogate, as a proper investment.

These pews are in many cases let by the proprietors to non-parishioners, and at present produce a total annual rental to the proprietors of from 300*l.* to 350*l.* a year.

In 1856 the district of Christchurch, Harrogate, by operation of Lord Blandford's Act, 19 & 20 Vict. c. 104, and the death in 1851 of the Vicar of Knaresborough, became a separate parish for all ecclesiastical purposes.

In June, 1861, it was resolved by the vote of the

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vestry to enlarge the church by the erection of two transepts and a chancel at the cost of 1,614*l.*, and 1,000*l.* of this sum was provided by a further sale of 24 pews in the transepts, and the balance by voluntary contributions. These additions to the church were made under the sanction of a Faculty, in which, however, no reference is made to the sale of the pews.

It appears by the register of the proprietors of the pews, which has been kept since 1831, that the title of the present proprietors is for the most part founded on purchase from the original proprietors or their successors.

Upon this state of facts the following observations arise:—

It is clear law that the sale or letting of pews in old parish churches is illegal, and that it is not competent to an Ecclesiastical Court to recognize a title to pews in such churches founded on pecuniary considerations.

The reason of this rule is that the fabrics of old parish churches were, until the abolition of compulsory church rates, kept in repair by church rates, and to burden a parish with the repairs of a church, out of which private individuals were making a profit, would have been unreasonable.

The rule against the letting of pews, however, does not hold good in the case of churches built under the Church Building Acts.

The chapel of St. John's never was, neither was Christchurch at the date of its consecration in 1831, a parish church, and the rule against the selling and letting of pews was not in my judgment, for reasons which I will now state, applicable to St. John's Chapel.

At the time of its consecration in 1749 the site on which it had been erected, not having been conveyed to

ecclesiastical uses, remained in the Duchy of Lancaster. In 1778 the Enclosure Commissioners allotted the site and chapel to the Duchy in right of the Duchy's interest in the wastes of Knaresborough Forest, thus treating the erection and consecration of the chapel as an encroachment on the Duchy's rights. It must be taken that from 1749 up to 1791 the church had no good title in law or equity to the chapel.

But the Duchy, by Letters Patent issued in 1791, cured the infirmity in the title by granting the chapel and burial ground to trustees, to hold the same as a chapel of ease to the parish church of Knaresborough for all time to come, subject to the condition of their keeping it in repair out of funds to be derived from the letting and sale of pews. This condition was in force when the chapel was pulled down in 1830.

Had the Duchy at the time of the arrangement for the erection of the new church revoked the Letters Patent of 1791, and under the Duchy's seal created powers for the sale and letting of pews in the new church, similar to those agreed to by the vestry, a good title might have been made out to these pews. But all that the Duchy did was to give their sanction to the vestry scheme for the sale of the pews by a letter written by the Secretary to the Council; but this did not constitute a valid execution of the power reserved to the Duchy by the Letters Patent of 1791, and was, therefore, ineffectual for the purpose for which it was intended.

The Court has therefore come to the conclusion, after a careful consideration of the documentary and other evidence put in and given at the hearing, that the sale of the pews in and since 1831 is not a transaction to which it is entitled by ecclesiastical law to give legal effect,

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and that the pews in question are in law now the property of the parish.

The Court, however, cannot shut its eyes to the fact that a substantial portion of the funds by means of which Christchurch was erected was obtained by the original sale of these pews, and that the money paid for the pews was paid under the supposition and on the faith that the sales were valid in law; that shortly after the erection of the church the title to one of these pews was accepted by the Court of Chancery as a good title; and that these pews have now for fifty-four years, with the sanction of the ministers and of the churchwardens of the church—the latter of whom are officers of the Chancellor—been treated and registered as transferable by sale, by settlement, by will, or by letters of administration; and that during the whole of this lengthened period they have been dealt with as marketable property, without objection taken by any party interested in the parish, until some fourteen months prior to the institution of this suit.

The Court has, therefore, come to the conclusion that any order it may make affecting the title to the pews of the defendants should be framed on the most favourable terms, and subject to conditions the most favourable to them that it is empowered by the discretion vested in it in granting Faculties for pews to concede. The Court has no power vested in it to require the parishioners or the vicar and churchwardens to refund any portion of the sums paid for the purchase of these pews as a condition precedent to the granting of the Faculty prayed, but the Court has a discretion vested in it of granting Faculties securing the use of pews in a parish church to parishioners personally for the occupation of themselves and their households so long as they shall continue

parishioners, and of annexing to houses in the parish pews by Faculty for the use of the occupiers for the time being of those houses. It is by the exercise of this discretion that the Court proposes to mitigate in some degree the hardship inflicted on the defendants as proprietors of these pews; and it is a satisfaction to the Court to observe that the petitioners in their petition ask that some compensation in this way should be made to those of the defendants who are parishioners.

I have before stated that there are seven sets of defendants in this suit, all of whom appear as claimants to proprietary pews, and I will now deal with the claims of each of the defendants separately—

1. The first and principal defendant is the Rev. Thomas Sheepshanks, of Park Place, in the parish of Harrogate. His father, Mr. William Sheepshanks, was one of the committee appointed to procure funds for the erection of Christ Church, and by purchase became proprietor of several pews, to which this defendant succeeded on his father's death in 1872. Mr. Sheepshanks did not by his counsel press his claim on the Court on pecuniary grounds; but he submitted that under the circumstances he should be treated with consideration in any order it might make. The Court will have very great satisfaction in inserting in the Faculty it issues a proviso that three pews be annexed to Mr. Sheepshanks' residence as Faculty pews: one for the occupation of himself and family or other occupiers of the house, and the other two for the use of the servants of the household. In the proviso a clause should be inserted that the pews in question shall be kept in repair by the owner or occupier of the house, and that the churchwardens shall be at liberty to fill vacant seats in the pews immediately

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before, I would say, the reading of the Psalms at any of the services; but I will reconsider this last provision.

2. Mr. William Henry Watson, as an executor of the late Mr. Watson, claims two pews in the transept under a sale made in 1861. One of these pews is occupied by two of the late Mr. Watson's daughters—Miss Watson, who occupies a house in the parish, and the other by another daughter, Mrs. Spence, and her children, who occupy another house in the parish, and who are interested in their father's residuary estate. The Court is prepared to annex to their houses two pews in the transept by Faculty, on the same terms as mentioned in reference to Mr. Sheepshanks' Faculty, or to grant them by Faculty the use of the pews so long as they may continue parishioners.

3. Miss Georgiana F. Watson claims a pew in the nave, for which, when she was an infant and a ward of Chancery, the Court sanctioned the payment of 60*l*. Miss Watson does not reside in the parish, but she has a farm, called the Granby Farm, with a farm-house on it, in the parish; and the Court is prepared to annex a pew to the farm-house on the same conditions as already mentioned.

The four remaining defendants are non-parishioners.

4. Mr. William Richard Abbey claims seven pews, at present let for 17*l*. 10*s*. a year. He has household property in the parish, six houses; and the Court is prepared to annex six of these pews to these houses as Faculty pews, or to any other six houses he may name, leaving him to make arrangements as to compensation from the owners of such houses.

5. Mrs. Maria Charlesworth, another non-parishioner, claims three pews in right of her husband, which are let for 11*l*. 8*s*. She has no property in the parish. The

Court would be prepared to annex three pews to houses named by her, so as to enable her to make an arrangement for compensation with the owners of such houses.

6. Mr. Powell's executors claim two pews, which are let. These may be annexed to houses belonging to the deceased's estate in the parish, or to other houses selected by them.

7. Mr. Byron claims one pew in the gallery. He only took it as security for costs, and the pew was valued to him at 5*l.*, and as he is solicitor for several of the defendants, the Court does not feel itself justified in giving him the disposal of a Faculty pew.

In coming to the decision I have done, in reference to the disposal by Faculty of these pews in favour of the defendants, I have carefully considered the judgment of Lord Stowell in *Walter v. Gunner and Drury*, 1 Haggard's Consistory Reports, p. 314, and the cases referred to in the note at p. 318. The present case differs materially from all these cases. It is exceptional in its circumstances, and is one *primæ impressionis*. Those cases related to the sale of pews in parish churches, which was held to be illegal; and in *Astley v. Biddle*, reported in the note, the Court says: "It may be true, as has been remarked in argument, that pews had been disposed of frequently to defray expenses, particularly in *chapels*. But *they* are private property. *This* is an old parish church, and I am of opinion that neither the parishioners by their consent, or the Ordinary, or any power but the Legislature, can deprive the inhabitants of a parish of their general right, and that such acts are contrary to the law of the land." St. John's Chapel was, by the terms of the Letters Patent of 1791, in the nature of a private chapel, and so continued

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after a district had been assigned to it by the Order in Council of 1828, and until it was pulled down in 1830. The Duchy did not part with the legal fee in the site by the Letters Patent (and as far as the evidence goes it is still in the Duchy (*a*)), but merely granted the chapel to be used as a chapel of ease to Knaresborough Church, subject to the control of the Duchy and to the conditions as reserved in the Letters Patent, all of which are inconsistent with the rights belonging to an ordinary parish church, or to an ordinary chapel of ease, and it was only in 1856, by operation of Lord Blandford's Act, that it became in any sense a parish church.

This is a case in which the Court has felt itself bound to exercise its equitable discretion in reference to granting Faculties for pews in the most favourable manner towards the defendants, and it has been influenced in so doing from the fact that two of them would, if it acted otherwise, be inconvenienced by a diminution in their incomes, and also by the consideration that it is thereby doing no injustice to the parishioners, as the parish has never contributed by rates either towards the procuring of the site or the erection of the church, as was usual in the case of an ordinary parish church.

There is a dictum of Sir John Nicholl, that a judge of an Ecclesiastical Court, in the exercise of the discretionary power vested in him in granting Faculties, should have regard to times and circumstances. The circumstances of this case are very special, and I think, under the circumstances, I am warranted, sitting here as an Ecclesiastical Judge, and being bound as an Ecclesiastical Judge to exercise equity in the most extended

(*a*) The Duchy has, since the delivery of this judgment, conveyed the site of the church and churchyard to the Incumbent.

sense, in taking the course I have done, and in endeavouring to mitigate the hardship which I feel has been imposed upon those defendants, who claim under the sales of pews effected to furnish funds for the erection of the church in 1830, by the omission on the part of the Duchy of Lancaster to revoke the Letters Patent before sanctioning the scheme of the Vestry for their sale. It is probable that the Court of Chancery, when sanctioning the purchase of Miss Watson's pew, considered that the sale and allotment of the pews was made in continuance of the powers contained in the Letters Patent. But the Letters Patent not having been revoked previously to the Council of the Duchy sanctioning the scheme of the Vestry, the consent of the Duchy given to it was informal and inoperative.

With regard to the costs, I shall leave each of the parties to pay their own costs. I do not feel myself warranted in condemning the defendants in any portion of the costs of the petitioners. I sit here as the Bishop's judge. In former days the Bishop sat in his own Court, and any person who felt himself aggrieved on a matter, within the episcopal jurisdiction, was entitled to go before the Bishop and ask for his determination on the point. Between 600 and 700 years ago, the Bishops delegated this duty to their Chancellors, and I, sitting here as Chancellor, am bound in the performance of my duty, if any parishioner considers himself aggrieved in a matter within my jurisdiction, to give him my decision on such matter; and I do not think that if he has taken a wrong view in regard to his rights, that I ought to condemn him in costs unless he has acted vexatiously. The view I take, and the view Ecclesiastical Judges have taken on questions of costs in cases like the present

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one, is that they should make such an order as will prevent heart-burnings in the parish, and very often the condemnation of parties in costs creates heart-burnings amongst parishioners.

The Vicar and Churchwardens were fully justified in taking the course they have done, and they will be entitled to their costs out of any funds subscribed for the proposed alterations in the church. These alterations could not be made except under the sanction of a Faculty, and to obtain a Faculty it was necessary that they should bring the whole facts of the case before the Court.

CONSISTORY COURT OF WAKEFIELD.

LIGHTFOOT, Clerk, AND OTHERS

v.

EASTWOOD AND THE INHABITANTS OF CROSS-STONE.

Faculty Pews in Old Church—Transfer to New Church by Deed of Appropriation unconfirmed by Faculty—Equitable Jurisdiction of Court—Subsequent Confirmatory Faculty—Costs.

1889.
March 1.

The parish church of Cross-stone was erected in 1835 by parochial subscriptions and a grant from the Ecclesiastical Commissioners, in substitution for a chapel erected in 1717, which had taken the place of an earlier chapel erected in 1530. The present church consisted of a middle aisle, two side aisles, with north and south and west galleries. The Incumbent and Churchwardens petitioned for a Faculty to authorize the removal of the north and south galleries, the substitution in the aisles of low pews with slanting backs for the present high ones, the doing away with square pews, and other alterations. The granting of the Faculty was opposed by Mr. Eastwood, who, with his ancestors, had been resident landed proprietors of the same property in the parish for upwards of four centuries, and in the enjoyment of

pews and seats annexed to houses on the Eastwood property since 1530. Mr. Eastwood's opposition was based on two grounds: First, that the proposed alterations were unnecessary, and would be no improvement, that they would seriously diminish the number of sittings, and that the opening of a third entrance to the church would increase the draughts in the church: Secondly, that they would interfere with the Eastwood Faculty pew, and with other Faculty sittings annexed to houses on the Eastwood property now owned by himself and his nephew. The pew and other sittings in question had been appropriated to the respondent's and his nephew's predecessors in title by an appropriation deed of even date with the consecration of the church in 1835, executed by four commissioners appointed for the purpose by the Archbishop of York as Diocesan, but the appropriation had not been confirmed by Faculty. There were 400 sittings appropriated by this deed as Faculty sittings.

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(1) *Held*, that the ostensible number of sittings in the church would not be diminished by the proposed alterations, and that the respondent's other general objections to the alterations might be met by slight modifications in the plan, which the Court would order to be made.

(2) That the respondent had by the evidence established that the predecessors in title of himself and his nephew were entitled to Faculty sittings in respect of houses on the Eastwood property, in the later as well as in the earlier chapel, and that in lieu of such sittings those now occupied by them had been appropriated in favour of their predecessors in title by the deed of appropriation of 1835, but that this appropriation, not having been confirmed by Faculty, did not confer on them a complete legal title to the sittings.

(3) That it was competent to the Court, in the exercise of its equitable jurisdiction, to cure the defect in the title of the respondent and his nephew to the seat and sittings in the aisles by decreeing a Faculty confirmatory of their appropriation under the deed of 1835, and that, under the circumstances, they were entitled to such Faculty.

(4) That like Faculties ought to issue to any claimants to sittings under the appropriation deed, upon the Judge being satisfied in Chambers that they were entitled to corresponding Faculty sittings in the later chapel.

(5) That as the claimants to sittings appropriated by the deed of 1835, in the north and south galleries, had failed to establish a title to corresponding Faculty sittings in the later chapel, they were not entitled to a similar confirmatory Faculty.

(6) That the respondent having reasonable ground for opposing the issue of the Faculty in the form originally prayed, there ought to be

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no order as to costs, excepting on the respondent to recoup to the petitioners such costs as they had incurred in producing evidence in support of his own title.

The case came on for hearing in a Court held in Cross-stone Church, when *Sager*, Solicitor, represented the Petitioners, and *T. W. Eastwood*, Solicitor, the Respondent.

The respective cases having been opened, and oral evidence produced by both parties, the Court was, by consent, adjourned to sit in London for the production of documentary evidence, and for further argument.

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and 13.

Documentary evidence was produced, and the arguments resumed in London.

Cur. adv. vult.

March 1.

Dr. TRISTRAM.—The Petitioners in this case are the Rev. Dr. Lightfoot, the Vicar, and the Churchwardens and seven leading Parishioners of the parish of Cross-stone. The respondent, Mr. Abraham Greenwood Eastwood, of Stoneyroyd, in the township of Stansfield, now in the consolidated chapelry of Harley Wood, is owner of one moiety of the Eastwood estate, in the parish of Cross-stone, of which he and his ancestors have been the resident proprietors for upwards of four centuries. For some forty years he was resident on his family property in the parish, and a regular attendant at Cross-stone Church; but, in 1864, that part of his property on which he resided was, by an Order of her Majesty in Council, placed within the boundaries of the consolidated chapelry

of Harley Wood, and since then he has attended the church of that parish, and only occasionally that of Cross-stone.

The parish of Cross-stone is made up of the two townships of Stansfield and Langfield, and originally formed part of the ancient parish of Halifax. According to one tradition, the first chapel of Cross-stone, being twelve miles from Halifax, was built in 1530; but there is evidence that in 1572 there was a chapel there, in which the services were performed by a chaplain, and to which there was an endowment annexed of 20*l.* a year, charged on the then enclosed lands in the township. In 1717 a larger chapel was built in its place; and in 1835 the present church (an entirely new building), at the cost of 3,500*l.*, 1,100*l.* of which was contributed by the parishioners, and the balance out of public moneys by the Church Building Commissioners, was erected and substituted for the second chapel; and after its consecration, on the 29th of September, 1835, the second chapel, which was in close proximity to it, was taken down under a Faculty.

The present church consists of a middle aisle, two side aisles, with north and south, and west galleries, the organ being in the west gallery. There is no chancel, and the pulpit, which is in the middle of the aisle, near the east end, intervenes between the communion-table and a considerable portion of the congregation. The vestry is inconveniently small, and there are only two doors of access for the congregation, at the south-east and west ends of the church. The church is estimated to accommodate in the pews, which are high pews, and ten of which are square ones, 616 persons, and there are also benches, (but which rarely are used,) for further accom-

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modation, against the walls of the side aisles and north and south galleries.

The petitioners ask the Court to grant a Faculty to authorize the taking down of the two side galleries; the substitution of low pews, with slanting backs, for the present high ones, and the doing away with the square ones; the removal of the screen at the west end, so as to add two rows of pews there; and the making of a third public entrance into the church, with a porch, at the north-east end. To these alterations objection has been taken by the respondent. There are further alterations proposed, to which no objection is taken.

The cause came on for hearing in the church of Cross-stone on the 5th of February, when it was opened, and witnesses on both sides were examined; and the case was then adjourned for argument, by consent, in London, for which purpose the Court sat there on the 12th and 13th of February.

By the pleadings, and at the hearing, the respondent objected to the Faculty issuing, on two grounds:—First, that the alterations objected to were unnecessary, that they were no improvement to the church, would seriously diminish the number of sittings, and that the opening of another entrance door would increase the draughts in the church, so as to occasion serious discomfort. Secondly, that they would interfere with a Faculty pew, known as the Eastwood Pew, and five other Faculty sittings in the middle aisle and two in the west gallery, all of which are annexed to messuages on the Eastwood estate, of which the respondent and his nephew were the owners.

The petitioners meet the first objection, (and in this they are supported by the vestry and the parishioners,)

with a direct negative. The proposed alterations have been submitted on two occasions to the vestry—on the 3rd of July, 1888, at which sixty parishioners were present, and on the 29th of December, 1888, at which about seventy were present—and at both meetings unanimous resolutions were passed approving of the alterations. Mr. Blacker, a local architect, well acquainted with the church, and who had examined the plans; Mr. Charles Crabtree, a parishioner of fifty-six years' standing and a regular attendant at the church; Mr. William Sager, the parishioners' churchwarden; and Dr. Lightfoot, the vicar, were all examined in support of the petition, and, according to their evidence, the proposed alterations would be decided improvements, on the following grounds:—The new seats would be more comfortable than the old ones, and would enable the occupants to kneel during the prayers, and to see the officiating minister at the communion-table, which many cannot do in the present seats. The removal of the north and south galleries was advisable, in consequence (amongst other reasons) of the wet rot being in the beams; the loss of sittings, occasioned by their removal, would be supplied by additional seats on the ground floor; and the third entrance to the church would conduce to the convenience, and, in the case of alarm, to the safety of the congregation.

Mr. Eastwood was the only witness examined in opposition to the Faculty. He pointed out that the additional entrance-door and the removal of the screen would increase the draughts in the church, to which its exposed situation, (standing on a ridge several hundred feet above the valley,) rendered it peculiarly liable, and against which the high pews were a protection. He further

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objected that the width of the seats in the proposed plan were 2 feet 7 inches, against 2 feet 10 inches or 3 feet in the present church, and that the middle aisle, which was 6 feet 7 inches in width, would be reduced to 4 feet 10 inches, not allowing sufficient space for the ingress and egress of the coffins and the bearers at funerals.

In deciding upon the first question raised in the case, the Court will be guided by the rules of ecclesiastical law, as stated by Lord Penzance in *Peek v. Trower* (Law Rep., 7 Probate Division, 27). "All presumption," says his Lordship, "is to be made in favour of things as they stand; if you and others propose to alter them, the burden is cast upon you to show that you will make things better than they are, that the Church will be more convenient, more fit for the accommodation of the parishioners who worship there, more suitable, more appropriate and more adequate to its purposes than it was before, and if you cannot show this to the Court, at least show the Court that a majority of those for whose worship the church exists, desire the alterations which you propose; and this is the language which, in substance, I think, the Court ought to hold."

The Court has felt that the objections raised by Mr. Eastwood on this part of the case were not without force, and were entitled to its careful consideration, and had they been supported by any considerable body of the parishioners who attend the church, it might, in some particulars, have come to a different decision. But the parishioners by their votes in and out of vestry, as far as the evidence goes, are favourable to the proposed alterations, and the Court being satisfied on the evidence, that they may be fairly considered to be in the main improvements, and that they will be conducive

to the convenience and comfort of the congregation, is unable to sustain the objections.

It was further contended that the sittings, by the removal of the side galleries and side benches, would be reduced from 978 to 659.

It is stated in the sentence of consecration of the new church, that it contains 970 sittings, 418 of which are free, but by the schedule to the deed executed by the Church Building Commissioners assigning the ministers sittings there are only 608 sittings in pews, and the estimate filed in Court gives 621 sittings in the body of the church and galleries. In estimating the number of sittings at 978, the benches against the walls of the side aisle and of the side galleries must have been computed. But they cannot properly be described as seats or sittings, as for the purposes of the accommodation of parishioners they are practically useless. The plan which the Court is asked to sanction without benches by Faculty gives 659 sittings, being an increase of fifty-one sittings over the number mentioned in the deed assigning the ministers sittings, and thirty-eight over the number mentioned in the estimate filed. To meet the objection that the width of 2 feet 7 inches in the pews is insufficient for comfort, the Court will direct that their width should be extended to 2 feet 9 inches, thereby reducing the number of sittings from 659 to 637, giving an increase of sixteen over the present number of sittings. There will be also a proviso in the Faculty, that every proper precaution shall be taken to prevent any annoyance from draughts, consequent on the removal of the screen, and the opening of the additional entrance door into the church.

The Court will now proceed to consider the second

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objection raised to the granting of the Faculty, namely, that it will interfere with Mr. Eastwood's Faculty rights in respect of the Eastwood pew, and of his five other sittings in the aisle, and of his two sittings in the west gallery.

On this part of the case three questions arise.

The first is, whether Mr. Eastwood has established such a claim by prescription as would warrant the Court in presuming in his favour a grant by a lost Faculty of these sittings in the second chapel, which was erected in 1717.

The evidence on this head is as follows:—In the history of the family of Stansfield, of Stansfield, published in 1885, there is an extract from the will of William Eastwood, of Swallow's Hay, in Stansfield, dated January, 1626, and proved April 16th, 1634, devising all the testator's right in a "forme" or "stall in the Chapell at Crose-stone to Simeon Eastwood and Sarah Eastwood, and their heirs," which is evidence that so far back as 1626 William Eastwood laid claim, rightly or wrongly, to the disposal of one sitting at least in Cross-stone Chapel. Again, in depositions taken in a suit in the Court of Chancery, instituted in 1713, and which terminated in a decree dated 1717, for the protection of the minister's rights to certain fixed payments out of lands in the two townships, called chapel wage, Edmund Barker deposed that he was seventy-five years old, was born and had resided all his life in Stansfield, and was owner of lands in Stansfield, for some of which the chapel wage was paid, but that he had other lands in the township of Stansfield, which are called new lands, and which never answered or were assessed anything to the said chapel, having no seats in the same, that belong to such lands.

There was also found amongst the parish papers a very important document, headed: "An account of all ye " formes, stalls or seats, picons, being in ye north side " of ye chapel at Cross-stone, below ye chancell, com- " monly called Stansfield side, and to whom and to what " place ye same do properly belong, as herein and here- " after followeth.—ANNO DOM. 1719." Then follows a list of 129 sittings, one close seat, a halfe forme, and a whole forme, with the names of the persons and places to which they severally belong. In pew No. 1, below the chancel, John Eastwood, for Eastwood, one seat. In pew No. 2, below the pulpit, John Eastwood, upper tenement, two seats. In No. 4, John Eastwood, for Eastwood, one seat. No. 10, John Eastwood, half forme. No. 12, Amos Eastwood, Ballynroyd, one seat. No. 13, John Eastwood, two seats for Eastwood.

Mr. Eastwood was born in the parish in 1823. He recollects attending service in the old chapel for six or seven years before it was taken down, and always sat in the Eastwood pew, which was then occupied by his family as the family pew, and had been considered by them as annexed to the estate for generations.

There is also evidence of William Eastwood claiming at least one Faculty seat in the original chapel as far back as 1629, and of seats, according to the deposition of Edmund Barker, in this same chapel being considered as annexed to houses in Stansfield as far back as 1660; and then there is a most important parish document, dated 1719, admitting an ancient right of the Eastwood Estate to several seats in the second chapel annexed to houses on the estate, and we find this family occupying seats as family seats in this chapel up to the time of its demolition in 1835, and from thence in the new church

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up to the present time, an undisturbed and undisputed possession for 120 years at least, and no evidence has been produced adverse to this claim.

Upon this state of facts the Court is of opinion that it ought to presume that the title to the Eastwood pew and the five seats in the aisle had a legal origin, namely, by a Faculty, which has been lost. The evidence in support of this prescriptive claim extends as long a time and is more cogent than that which was recently held to be sufficient by Lord Esher, Lord Justice Bowen, and Lord Justice Fry, in the Court of Appeal, to establish a title to a Faculty pew in the Warminster Case (*Halliday v. Philipps and others (a)*), the principles of which decision are binding on the Ecclesiastical Courts.

Lord Justice Bowen says, in his judgment, "There is no principle more sacred in our land than that of paying respect to ancient and quiet possession in a man and his predecessors, so as not to call upon him to produce, after a long lapse of time, express proof of his title."

The second question on this part of the case is whether the right to these prescriptive seats has been legally transferred to the present Church in or since 1835.

For the Respondent it was contended, that there has been such a legal transfer under an appropriation deed executed by four Commissioners on the 29th of September, 1835, the date of the consecration of the new church.

The deed itself does not state under what authority the Commissioners acted. For the Respondent it was contended, that the Commissioners acted under the authority of the Church Building Commissioners in virtue of sect. 23 of 3 Geo. IV. c. 72, and that they were appointed for the express object of transferring the rights

(a) L. R. 23 Q. B. Div. 48; L. R. App. Cases, (1891) 228.

in the pews of the old chapel to the new church, and that the fact of the Church Building Commissioners having been cognizant of what was being done, and taking no exception to it, as evidenced by the correspondence and the deed executed by them in 1837 assigning the ministers' seats, ought to be taken as a sufficient authorization by them of the appropriation under this section.

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The Court is not satisfied that section 23 is applicable to the circumstances of this case, but whether it is or is not, it has come to the conclusion upon the evidence that the aid of this section was not in fact ultimately invoked for the purpose of validating the transfer of the rights in the seats in the old church to the new one, and of making a further appropriation of pews and sittings in the new church, but that the authority ultimately invoked was that of the Archbishop of York, who, in fact, issued the Commission under which the Commissioners acted.

The first piece of documentary evidence on this part of the case is a letter dated June 19th, 1835, from the Rev. John Fennell, Perpetual Curate of Cross-stone, to Mr. Jelf, Secretary to the Church Building Commissioners, as follows:—"I have the great pleasure in informing Her Majesty's Commissioners that the new church at Cross-stone will be opened (D.V.) on the 9th July.

"I should be glad to know their pleasure on the subject of the appropriation of the seats, &c. I hope they will appoint a sub-commission for that business: there will be about 350 sittings already appropriated, and 266 ditto free and unappropriated—amount 616; the whole number of sittings in the church 1,020. Awaiting any directions you may think proper to give, &c."

No answer has been found to this letter, and from the subsequent correspondence and documents the Court is

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warranted in concluding that the Commissioners declined to appropriate the sittings themselves.

The next document in order is a draft petition from owners of houses in Cross-stone to the Archbishop of York, in the handwriting of Mr. William Eastwood, Mr. Fennell's solicitor, and endorsed by him "Engrossed and sent," giving a history of the appropriation of seats in the old chapel, and asking his Grace to appoint Commissioners to appropriate sittings in the new church to those entitled to them in the old one, and to make further appropriations on the basis on which the Commissioners made the appropriations by the deed referred to. This is followed by a letter dated July 20th, 1835, from Mr. Eastwood, writing for the Commissioners appointed by the Archbishop, and headed, "Ex parte the Commission to reseat Cross-stone Church," which, after stating that the Commissioners who had been named in this matter having found upon inquiry that a variety of cases might occur in the execution of the Commission, which appeared to them to require some definite instructions prior to their proceeding to act thereupon, asked his Grace for instructions on certain points mentioned in the letter.

It is clear from these two last documents that the Commissioners who executed the deed of appropriation were appointed and acted under a Commission issued by the Archbishop of York, and not under the authority of the Church Building Commissioners, and this Commission, according to the practice, would be transmitted to the first-named Commissioner, without being necessarily registered in the Diocesan Registry.

To have given the appropriation deed legal force and effect by ecclesiastical law, it should have been confirmed by a Faculty. There is, however, no evidence to show

that it ever was confirmed by a Faculty. On the contrary, the Diocesan Registrars of York and Ripon state that there is no trace in their registries of any such Faculty ever having issued, and that had such Faculty issued in or since 1835, an entry of it would, in accordance with the invariable practice of their Courts, have been made in their books.

There next follows a petition signed by Mr. Fennell and the principal inhabitants of Cross-stone, on the new church having been completed, for a Faculty to authorize the taking down of the old church, accompanied by a letter from Mr. Eastwood, dated September 20th, 1835, stating, "that it would be of no use asking the chapel-wardens to sign any document or do any act for the benefit of the church, inasmuch as their conduct had been decidedly opposed to its best interests; that in fact they were appointed for the purpose of opposition, and asking, therefore, that their signatures to the petition for the Faculty might be dispensed with." On the following day the Faculty prayed for issued out of the Consistorial Court. At a vestry meeting held in this year a church rate, for the purpose of paying the expenses of the consecration of the church and for the Faculty, was refused by a large majority, indicating the strength of the opposition at that period to the church party in the parish.

On the 29th of September the new church was consecrated, and the deed of appropriation was executed the same day. Subsequently objection was taken by the Church Building Commissioners to the erection of square pews, and to remove this objection a petition was transmitted to the Commissioners, and another to the Archbishop from the principal parishioners, asking for their

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retention, in which it is stated that the parishioners believed it had been ordered that seats and sittings should be provided in the new church for those who were entitled to them in the old chapel, and that in conformity therewith certain Commissioners duly appointed in that behalf had proceeded to make such appropriation accordingly, which was completed and signed on the 29th day of September last, being the day on which the said church was consecrated, and that the proprietors of such pews had been in possession thereof as owners since that date.

It is clear from this last document that the deed of appropriation was treated in the parish as a valid instrument without confirmation by a Faculty; but by Ecclesiastical Law no seats or sittings in a church can be appropriated except by Faculty, and no Faculty can issue for their appropriation without first giving the parishioners an opportunity by citation of appearing to oppose it. This not having been done, the appropriation deed cannot confer a valid title to the sittings by transfer or otherwise.

It is probable that when application was first made to the Archbishop for a Commission it was intended that the appropriation deed should be confirmed by a Faculty, and that the application for a Faculty was abandoned in consequence of the anti-church feeling in the parish, to avoid the risk of litigation in the Ecclesiastical Court. In the absence of a confirmatory Faculty, the Court is bound to hold that neither Mr. Eastwood nor any of the other parishioners, who were entitled to Faculty seats in the old church, have obtained a perfect title to corresponding seats and sittings in the new church.

The remaining question on this part of the case is, whether it is now competent to this Court to cure the

defect in Mr. Eastwood's title to sittings in the family pew and the five other sittings in the aisle, and it is of opinion that it has power to perfect his title, and that, having regard to the facts that he and his ancestors have been in undisputed possession of these seats in Cross-stone Church annexed to houses on the Eastwood Estate for 200 years or more, and to the recognition given to such right by the parish document of 1719, that it ought to assist him in perfecting his title.

The Court is therefore prepared, on his applying at the registry, to direct a Faculty to issue to him confirming his title to these sittings in lieu of his rights to corresponding sittings in the old chapel, without a further citation.

From the parish document, dated 1719, it appears that there were about 140 Faculty sittings in the old chapel annexed to certain messuages in Stansfield, and if any of the parties to whom such messuages belong desire to have their title to a like number of seats secured to them in the new church, the Court would be prepared to consider their title as resting on a lost Faculty upon their making or joining with Mr. Eastwood in an application to the registry for that purpose.

With regard to the sittings in the galleries, which are dealt with in the appropriation deed as Faculty seats, it is clear that the Commissioners were in error on this point; for it appears by a document in evidence that the galleries were only completed in 1799, and that on their completion the sittings in them were put up to public auction and sold to the predecessors of the present occupants for very small sums, the highest price paid per sitting being 2*l.* 10*s.*

There is no ground, therefore, for treating them as

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Faculty seats, and their appropriation as such is clearly invalid.

With regard to the other sittings appropriated by the deed as annexed from time immemorial to the messuages therein mentioned, there is no evidence before the Court to warrant the assumption that they were originally Faculty sittings, and the Court would therefore not be justified upon the present evidence in recognizing them as such. The remaining seats appropriated by the deed in consideration of payment of chapel wage were so appropriated on equitable considerations, but in the absence of a Faculty confirming such appropriation the appropriation is without legal effect.

A prescriptive claim to some sittings annexed to houses in Langfield Township might possibly have been established, but as no evidence has been produced in this suit in support of such claim, the Court is not in a position to pronounce for it.

The result of this inquiry is that the Court can only recognize 140 prescriptive or Faculty sittings out of the 400 appropriated under the deed as entitled to be confirmed by Faculty. It will, however, direct the churchwardens to allot to the present occupants of the remaining 260 sittings, so long as they occupy their present houses, sittings equal in number to those they now occupy, and as near as practicable to the position of the present ones, subject to the payment of any chapel wage due in respect of their holdings. But on their occupation of their houses being determined from any cause whatsoever, these sittings will revert to the parish for re-allotment by the churchwardens or for free sittings.

There are a large number of ministers' sittings in the galleries. There must be an equal number of equally

good sittings substituted for those in the side galleries in the body of the church, and numbered as ministers' sittings.

There lastly remains for the determination of the Court the question of costs incurred in obtaining the two Faculties,—the one for the alterations in the church, and the other for confirming Mr. Eastwood's rights, and probably other rights, to prescriptive sittings in the present church.

The present litigation has not arisen from any desire on the part either of the petitioners or of the respondent to be involved in a suit in this Court. It has been forced upon them by the course of action pursued, (and probably wisely so,) by the church party in the parish in 1835, as well as by the action of this Court. The petitioners, to avoid litigation, were at the outset, as appears by the prayer of their original petition, prepared to assent to the Court treating the appropriation deed of 1835 as having the force of a Faculty. But the Court felt that it could not, in justice to the parishioners, or in accordance with the principles of Ecclesiastical Law, or the practice of the Ecclesiastical Courts, saddle the parishioners with 406 Faculty sittings, more particularly in a church with accommodation for about 640, till it was satisfied upon legal evidence that the occupants of these sittings were entitled to them by Faculty or by prescription, and it therefore directed that the application for the Faculty should be heard in Court.

In the result a claim has been established to 140 prescriptive sittings only, instead of to 406.

In apportioning costs the rule is that the applicants for a Faculty for alterations in a church pay the costs incurred by them in order to obtain the Faculty; but that

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parties who shall have, without reasonable grounds, resisted the granting of the Faculty, shall be condemned in the costs occasioned by their opposition. The Court cannot hold that Mr. Eastwood acted unreasonably, especially when he was brought necessarily before it on another part of the case, in pointing out objections to some of the proposed alterations, and therefore cannot condemn him in any of the costs of his opposition to the first Faculty, and I leave each party to bear their own costs of this part of the case.

With regard to the costs of the confirmatory Faculty, the Court cannot hold that the petitioners acted unreasonably in questioning, in the manner they did, Mr. Eastwood's claim, and therefore, although they have done so unsuccessfully, it cannot order them to pay Mr. Eastwood's costs, which he, according to the practice, should bear himself. He should also pay any reasonable costs incurred by the petitioners in supplying documentary evidence necessary for the determination of the effect of the deed of 1835, and for the establishment of his claim to his prescriptive seats.

There are other parties in the parish who have a common interest with Mr. Eastwood in establishing this claim, and those who may join with him in a petition for a joint confirmatory Faculty might be very properly asked by him to contribute towards his own and these costs. But as they are not parties to this suit, this last observation must be treated not as an order, but only as a suggestion of the Court.

A Faculty was decreed in the above terms.

CONSISTORY COURT OF LONDON.

THE VICAR AND CHURCHWARDENS OF ST. JUDE'S, SOUTH
KENSINGTON

v.

THE PARISHIONERS (TOPHAM Intervening.)

*Faculty for a Tower and Spire and One Bell—Peal of Bells—Protective
Proviso in Faculty.*

The Court has jurisdiction to make an order to prevent church bells from being rung for an improper purpose, or unnecessarily to the detriment of houses in the vicinity.

1877.
July 22.

The Court decreed a Faculty for the erection of a tower and spire with one bell in the tower, subject to a proviso that no peal of bells should hereafter be placed in the tower, except under a Faculty decreed after the parishioners had been cited to show cause against its being issued.

This was a petition for a Faculty to authorize the erection of a tower and spire to the church of St. Jude's, South Kensington. Funds sufficient for the erection of the tower had already been subscribed, and nearly sufficient for the erection of the spire.

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Moore, Proctor for the Vicar and Churchwardens, prayed the Court to decree the Faculty.

The Reverend Dr. Collis, Vicar of St. Jude's, gave evidence in support of the Faculty.

Dr. Topham, a lessee of one of the houses fronting the church, had entered an appearance to the citation, and now appeared with his solicitor, who stated that he had

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no objection to the erection of the tower and spire, but there being an impression abroad that a peal of bells might hereafter be placed in the tower—to which he and his neighbours in Collingham Road objected—as their ringing would be an annoyance there, and deteriorate the value of their property, he must ask the Court to decree the Faculty, subject to a proviso, that no peal of bells should at any future time be placed in the tower or spire.

Dr. John Topham, M.D., deposed that he resided at 19, Collingham Road, South Kensington, and was a resident parishioner of St. Jude's. There were ten houses in Collingham Road fronting the church. He held a lease of the one he occupied, with 97 years to run. An impression had got abroad that the Church Building Committee contemplated placing a peal of bells in the tower, and the Bishop of London had therefore, at the request of the churchwardens, stated from the pulpit of the church, on the 10th of December, 1876, before preaching a sermon for the Building Fund, that there would be no peal of bells. The Building Committee had since refused to give a pledge against the erection of a peal of bells at any future time. He did not object to a single bell.

The Honorable Charles Keith-Falconer deposed, that he resided in Collingham Road, opposite the church, and was the parishioners' churchwarden, and had asked the Bishop of London to make the announcement mentioned by Dr. Topham. The impression that the Committee contemplated placing a peal of bells in the tower was without foundation. He considered that a peal of bells would deteriorate the value of the houses opposite, and he should certainly oppose their erection.

Dr. TRISTRAM.—My attention has been recently directed by the Bishop of London to questions similar to the one raised in this case. Complaints have been made to his Lordship by parishioners of their church bells being rung with unnecessary frequency, or for an unnecessary length of time, to the serious annoyance of occupants of houses in the immediate vicinity of the Church. One of these cases arose in the parish of Bedfont, which was referred to me, as Chancellor, and in which I effected out of Court an arrangement satisfactory to all parties. The Bishop is strongly of opinion that this Court should give relief in such cases, as far as it legitimately can, rather than that they should be allowed to travel into the Civil Courts. This Court having jurisdiction over the Church and all its ornaments,—and church bells being technically church ornaments, if they are used improperly, for an improper purpose, or in a manner to occasion unnecessary annoyance—it is clearly competent to it to make an order to prevent their being so used.

In the case before the Court, there is no present apprehension of a peal of bells being placed in the tower. But Dr. Topham being apprehensive that they might at some future time be placed there, asks the Court to make an order in such a form as to render this contingency an impossibility. The Court is unable to make such an order. I cannot tie the hands of my successors to such an extent as this. But I will assist Dr. Topham and his neighbours as far as I can, by directing a proviso to be inserted in the Faculty: “That no additional bell, (besides the one authorized by the Faculty), be hereafter erected in the tower without application to and leave obtained from this Court, of which application the parishioners are to have due notice by citation.” This

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proviso will give the owners of these houses ample opportunity of opposing any future attempt to introduce a peal of bells, and Dr. Topham may rest assured that there will be every disposition in the Court, in accordance with the principles on which it has heretofore acted, to protect the interests of the owners of the property he represents, as far as it reasonably can. Let the Faculty, subject to this proviso, issue for the erection of a tower and spire, with a single bell in the tower; the works to be completed within five years from the date of the Faculty, with leave to the petitioners or their successors in office to apply for an extension of time if required.

CONSISTORY COURT OF LONDON.

THE VESTRY AND CHURCHWARDENS OF THE PARISH OF
ST. GEORGE'S, HANOVER SQUARE

v.

THE PARISHIONERS AND OTHERS INTERESTED (ARTIS
Intervening)(a).

*Consecrated Burial Ground—Metropolitan Open Spaces Acts—Public
Garden—Conveyance of Ground by Rector to Vestry—Agreement—
Form of Faculty.*

1888.
July 5.

Where a district board or a vestry proposes to undertake to lay out and keep in order a churchyard, or consecrated burial-ground, to give them the requisite control over the ground, it is unnecessary for the rector or vicar to convey the ground to them. An agreement for this

(a) Reported in 4 Times Law Reports, 661.

purpose is sufficient. In either case, a Faculty is necessary to enable the vestry or board to effect their purpose.

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This was a petition under the Metropolitan Open Spaces Acts for a Faculty to convert the parochial disused consecrated burial-ground situated in Mount Street, Grosvenor-Square, into a Public Garden, a small portion of it to be reserved for the enlargement of Grosvenor Chapel. The Vestry, who with the Churchwardens were the Petitioners, were prepared to lay out the ground and keep it in order. The Rector (the Rev. Canon Capel Cure) had offered to convey the ground to the vestry under the provisions of the Metropolitan Open Spaces Act. Mr. Artis, whose family had been resident in the neighbourhood for 145 years, had appeared and filed a petition asking the Court not to sanction the removal of a tombstone belonging to his family, which was in the burial-ground. The Court had granted a Faculty on the 11th day of August, 1879, for the erection of a mortuary in the ground, but the Duke of Westminster having subsequently presented the vestry with a more convenient site for a mortuary in another part of the parish in substitution for the proposed site in the burial-ground, and which had been accepted by the vestry, their intention of erecting a mortuary in the burial-ground had been abandoned.

Beaufort moved for the Faculty, and examined witnesses in support of the application. He stated that it was not proposed to interfere with the tomb belonging to the family of Mr. Artis, provided Mr. Artis would keep it in repair, which Mr. Artis had agreed to do.

1888.
July 5.

Dr. TRISTRAM.—The Court revokes the Faculty dated

1888.
July 6.

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August 11th, 1879, for the erection of a mortuary. The Court is satisfied from the evidence before it, that the petitioners have complied with the provisions of the Open Spaces Act, 1887, and it therefore has no hesitation in decreeing the Faculty. There is one point upon which it is the duty of the Court to make an observation. The rector has proposed to convey the soil of the churchyard to the vestry under sect. 4 of the Open Spaces Act, 1881, 44 & 45 Vict. c. 341, which he is, but only to a limited extent, empowered by this section to do.

This section of the Act provides "that the owner of any closed churchyard, cemetery, or burial-ground may convey the soil of such churchyard, cemetery, or burial-ground, or grant any term of years or other limited interest therein, or enter into any agreement with the Metropolitan Board, a vestry, or district board, &c., for the purpose of giving the public access to the said churchyard, cemetery, or burial-ground, and preserve the same as an open space, accessible to the public, and under the control of such board or vestry, and for the purpose of improving and laying out the same."

It is to be observed that this section does not empower the rector or vicar to make an absolute conveyance of the soil, but only a conveyance limited to certain specified purposes—so that for all other purposes the freehold of the soil remains in the rector or vicar.

Then, in sect. 5 of this Act, there is a proviso "that no board or vestry shall exercise any of the powers of management in this Act mentioned in reference to any consecrated ground, unless and until they are authorized so to do by the Licence or Faculty in that behalf of the Bishop of the Diocese in which such consecrated ground is situate, which Licence or Faculty may be granted by

such Bishop upon the application of the board or vestry, and may extend to the removal of any tombstone or monument, under such conditions and subject to such restrictions as to the Bishop may seem fit."

The conveyance of the rector unsanctioned by a Faculty would be futile for the purpose of giving effect to the previous section.

In these cases it has not been usual for a conveyance of the soil to be made. The same thing can be effected by an agreement to be sanctioned by a Faculty. In future, it would be more convenient for this course to be adopted, and it will also be a saving of expense. The Faculty may issue with a proviso of protecting the family tomb of Mr. Artis from being interfered with. It will not issue for fourteen days, during which time it will be open to other persons interested in tombs or grave-stones in this burial-ground, after giving due notice to the petitioners, to make an application to me in chambers for the insertion of a further proviso in the Faculty in respect of their family tombs or grave-stones.

1888.
July 6.

THE VESTRY
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CONSISTORY COURT OF LONDON.

THE RECTOR AND CHURCHWARDENS OF ST. BENE'T
SHEREHOG

v.

THE PARISHIONERS.

THE RECTOR AND CHURCHWARDENS OF ST. NICHOLAS ACONS

v.

THE PARISHIONERS.

*Faculty—User of Right of Way underneath a Churchyard—Electric
Lighting Company—Public Convenience—Payment of Annual Sums
to Rector for Church Expenses.*

1892.
April 6.

The Court having a discretionary jurisdiction to grant by Faculty the user of a way across a churchyard for public convenience, or to an individual for private convenience, provided no detriment will thereby accrue to the parishioners, has also a discretionary jurisdiction to grant the exclusive user of a right of way underneath a part of a churchyard to an electric lighting company, to enable it to introduce electric lighting into the neighbourhood.

The Faculty should be granted, subject to the payment of an annual sum to the rector as the freeholder of the churchyard.

These were petitions by the Rector and Churchwardens of the parishes of St. Bene't Sherehog and St. Nicholas Acons for Faculties authorizing them to grant small portions of the churchyards to the City of London Electric Lighting Company, Limited, for the purpose of giving access to vaults to be constructed by the company under the public footway in Pancras Lane and Nicholas Lane, adjoining the churchyards.

Arnold Statham for the Petitioners.

1892.
April 6.

THE RECTOR
AND CHURCH-
WARDENS OF
ST. BENE'T
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THE RECTOR
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The City of London Electric Lighting Company, Limited, being engaged in lighting the whole of the City, including these parishes, with the electric light, had obtained permission from the Commissioners of Sewers to place under the footway in Pancras Lane and Nicholas Lane vaults or chambers. The company desired to obtain access to the vaults from the churchyards of St. Bene't Sherehog and St. Nicholas Acons. Resolutions had been passed by the vestries of both parishes approving of the grant to the company of the use of small portions of the churchyards for a term of twenty-one years for the purpose of giving access to the vaults, the company paying all the costs and expenses, and paying a rent of 5*l.* per annum in the case of St. Bene't Sherehog, while in that of St. Nicholas Acons a peppercorn rent was reserved, the company agreeing to contribute 20*l.* annually to the incidental rate for the ecclesiastical purposes of the parish. There is no church of St. Bene't Sherehog or of St. Nicholas Acons in existence, they having been destroyed in the Great Fire. The parish of St. Bene't Sherehog was united for ecclesiastical purposes to that of St. Stephen, Walbrook, and the parish of St. Nicholas Acons was united for ecclesiastical purposes to that of St. Edmund the King and Martyr. The churchyards of St. Bene't Sherehog and St. Nicholas Acons were closed for burials, by Orders in Council in 1854.

Witnesses were examined, including Major-General Webber, in support of the applications.

1892.
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 THE RECTOR
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 WARDENS OF
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 THE RECTOR
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Dr. TRISTRAM.—There is no precedent for the granting of a Faculty under the circumstances mentioned in the two cases now before the Court. Two questions arise on the present applications. The first question is, whether it is within the discretionary jurisdiction of the Court to grant the Faculties asked for upon the facts proved. The second question is, whether, if it is within its discretionary jurisdiction, the granting of the Faculties would, upon the facts proved, be a proper exercise of such discretion.

The Court has undoubted jurisdiction to grant by Faculty the user of a way across a churchyard for public convenience, or to an individual for private convenience, provided no detriment will thereby occur to the parishioners. When it grants the user of a way by Faculty for private convenience to an office or house, it requires the payment to the rector or vicar of an annual sum for the accommodation conceded.

The present applications are made by the rectors of the two parishes, with the sanction of the parish vestries, but at the instance of the City of London Electric Lighting Company, Limited, not for the user of a way across the two churchyards, but for leave to construct a flight of steps, with an entrance thereto, underneath the edge of each of the churchyards, with the exclusive user of such entrance or steps in order to give the company access to chambers or vaults which it proposes, with the sanction of the Commissioners of Sewers, to construct underneath the narrow street abutting on each churchyard, for the storage of an apparatus for converting electricity with a view to enable it to introduce electric lights into the neighbouring offices.

On the first question I would observe, that if the Court has jurisdiction to grant a Faculty to give the user of a

way across a churchyard, it must equally have jurisdiction to grant the user of a way underneath a portion of a churchyard. The Court being of opinion that it is within its discretionary jurisdiction to grant a Faculty for erecting the flight of steps underneath the churchyard, with an entrance thereto, for the object named, it remains for it to consider the second question—namely, whether from the facts proved it ought to exercise such discretion in the present cases.

I have had the advantage of inspecting these churchyards, accompanied by Major-General Webber, the chief engineer of the company, and it occurred to me during the inspection, as it is proved in the evidence, that, if the Faculties are not granted, the company would be unable to introduce electric lights into the offices of this part of the City, unless it were to construct entrances in the narrow streets, which Major-General Webber says in his evidence would be an intolerable inconvenience to the public, or unless it were by purchase to procure a right of entry to the chambers from one of the opposite houses, and this it might be unable to do without a private Act of Parliament. It is clearly, therefore, for the convenience of the parishioners that the Faculties should be granted. The granting of them will be no detriment to the parishioners or to those interested in the churchyard. In St. Nicholas Acons the burials were all in vaults, and the proposed erections as modified by the Court cannot possibly interfere with these vaults. In St. Bene't Sherehog the erection is so near the edge of the churchyard that it is not probable that it will necessitate the interference with any human remains. If it does so, the matter must be referred to the Court for further directions.

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April 6.
THE RECTOR
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WARDENS OF
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With regard to the payment of 5*l.* a-year proposed to be made by the company in respect of St. Bene't Sherehog, it is proved by the rector's evidence and the production of the churchwardens' account-books, that all emoluments arising from the churchyard are payable to the rector. The rector is prepared to assent to the payment being expended in keeping the churchyard in order. The Faculty will therefore authorize the payment to be so dealt with during his incumbency, and afterwards to be dealt with as his successors may direct.

With regard to the voluntary payment proposed to be made to the churchwardens of St. Nicholas Acons, to be appropriated towards keeping the church and churchyard in repair, different considerations apply. It appears that a sum of 300*l.* a-year was formerly paid to the churchwardens, partly as rents for houses adjoining the churchyard, and partly for the enjoyment of lights on to the churchyard from other houses, which had been appropriated towards church expenses and for other parochial purposes, and the churchwardens loudly complain of the great injustice which has been perpetrated under the City of London Parochial Charity Act in enabling the Charity Commissioners to appropriate the whole of the fund, thereby denuding the churchwardens of any fund whatever for the sustentation of their parish church and their parochial churchyard. It further appears that this appropriation of the Charity Commissioners was confirmed by a judgment of Lord Justice Kay (*Re the Parish of St. Nicholas Acons*, 60 L. T. N. S. 532). It is certainly to be regretted that the City of London Parochial Charity Act should have been so worded as to allow of such a disposition of this property to be effected.

For the purposes of the present order, it appears that the rector has always received all interment fees arising from the parochial churchyard. The churchyard being consecrated ground, is under the exclusive control of this Court, and cannot be interfered with without its sanction. As the rector consents to the sum of 20*l.* a-year being paid as a contribution by the company to a church fund for keeping up the church and churchyard, the Court will by the Faculty sanction such payment, but it should be understood that the title to the payment is dependent on the Faculty, and not on any agreement of the company with the rector and churchwardens. The Court decrees the Faculties subject to the terms mentioned.

1892.
April 6.
THE RECTOR
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SUPPLEMENT.

Paper read at the Church Congress, held at Folkestone on October 5, 1892, on Canon Law, in connection with the Discipline and the Government of the Church of England.

CHANCELLOR TRISTRAM.—The expression “canon law” when used in connection with the ecclesiastical laws of England may have a two-fold signification. It may be used to signify the Roman canon law, or the English canon law referring to the laws, canons, and constitutions of the Church of England which were in force in this country prior to the Reformation. But it has been established by numerous decisions of the Courts that no rule of the Roman or English canon law is of binding obligation in this country, unless it can be shown to be comprised in what are termed “the King’s Ecclesiastical Laws.”

Lord Chief Justice Tindal, in delivering the opinions of her Majesty’s judges, in answer to questions proposed to them by the House of Lords in *The Queen v. Millis* (10 Clark & Finnely, p. 680), states: “That the canon law of Europe does not, and never did, as a body of laws, form part of the law of England, has been long settled and

established as law. Lord Hale defines the extent to which it is limited very accurately. 'The rule,' he says, 'by which the Ecclesiastical Courts proceed is the canon law, but not in its full latitude, and only so far as it stands uncorrected either by contrary Acts of Parliament or the common law and custom of England; for there are divers canons made in ancient times, and decretals of the Popes, which were never admitted here in England.'" (Hale's History of the Common Law, cap. 2.) "Indeed," the Lord Chief Justice continues, "the authorities are so numerous, and at the same time so express, that it is not by the Roman canon law that our judges in the Spiritual Courts decide questions within their jurisdiction, but by the King's Ecclesiastical Law, that it is sufficient to refer to two as an example of the rest. In *Cawdrey's Case*, which is entitled 'Of the King's Ecclesiastical Law,' in reporting the third resolution of the judges, Lord Coke says:—'Albeit the kings of England derived their ecclesiastical laws from others, yet so many as were proved, approved, or allowed here, by and with a general consent, are aptly and rightly called "The King's Ecclesiastical Laws."' In the next place, Sir John Davies, in *Le Case de Commendam* (in the Irish Courts, temp. Jac. I.), shows how the canon law was first introduced into England, and fixes the time of such introduction about the year 1290, and lays it down thus:—'Those canons which were received, allowed, and used as in England, were made by such allowance and usage part of the King's Ecclesiastical Laws of England. Yet all the ecclesiastical laws of England were not derived and adopted from the Court of Rome, for long before the canon law was authorized and published (which was after the Norman Conquest) the ancient kings of England—

viz., Edgar, Athelstan, Alfred, Edward the Confessor, and others—did, with the advice of the clergy within the realm, make divers ordinances for the government of the Church of England; and after the Conquest divers provincial synods were held, and many constitutions were made in both the kingdoms of England and Ireland, all of which are part of our ecclesiastical laws at this day.' (Sir John Davies, 69 b and 70—72 b.)"

I do not propose in this paper to enter into the consideration of the question in what particulars the Roman canon law was or was not accepted as law in England at various times prior to the Reformation. In matters relating to Church order and discipline, some of its provisions are embodied in, or their observances expressly enjoined by, the Anglican legatine and archiepiscopal constitutions promulgated subsequent to the Conquest. These constitutions would appear to have been intended to form, and did, I think, in fact form, a code in the main sufficient for the government and discipline of the Anglican Church in those times. The regulations contained in them, so far as they were consistent with the doctrines and discipline of the Anglican Church after its renunciation of the errors of the Church of Rome, will be found to have been in great part embodied in our system of ecclesiastical law; some few of the rubrics, as, for example, the regulations in the marriage service as to banns, inserted there, doubtless for the information of the people, as well as to give them the same Parliamentary sanction as had previously been given to marriage licences, and many more in the royal, and archiepiscopal, and episcopal injunctions and orders issued prior to the publication of the Canons of 1603.

The Canons of 1603, having received the sanction

of Convocation and the Sovereign, are held to be binding on the clergy, but, not having received the sanction of Parliament, are held not to be obligatory in matters affecting the laity, except in so far as they embody correct declarations of the King's Ecclesiastical Laws. Thus the 62nd Canon, which directs, "That no minister shall celebrate matrimony without a Faculty or licence, except the banns of matrimony have been first published in the parish churches and chapels where the said parties dwell, and that no minister shall join any persons so licensed in marriage but either in the said churches or chapels where one of them dwelleth," might have been so read as to preclude a minister from marrying by licence two persons, neither of whom were his parishioners.

But it was held otherwise, on the ground that the laity prior to the Reformation having been entitled under the archiepiscopal constitutions to be married by licence in a church out of the parish of either of the parties, and that as the right of the Bishops to grant such licence was reserved by 25 Hen. VIII. c. 21, s. 15, this right could not be abrogated to the prejudice of the laity by a canon unconfirmed by Parliament (see Canon 8 of the Westminster Canons, A.D. 1200; Canon 12 of Archbishop Mepham's Constitutions, A.D. 1328; and Canon 7 of the Constitutions of Archbishop Zouche (Archbishop of York), A.D. 1347, Johnson's "English Canons," Part II.). And it will be found on referring to the registers of licences issued in the dioceses of Canterbury and London, as well as in other dioceses, that between 1603 and 1753 (the date of Lord Hardwicke's Marriage Act), which first compelled parties married by licence to be married in their parish church,

that marriages by licence were very commonly solemnized outside the parish of the parties.

Again, in the case of *Middleton v. Croft*, decided in 1736, the Middletons had been articulated in the Ecclesiastical Court for having been married at an uncanonical hour, not between the hours of eight and twelve in the forenoon, as enjoined by the 62nd Canon. They moved the King's Bench for a prohibition on the ground that the limitation as to time was introduced by this canon, and that the canon, being unconfirmed by Parliament, did not bind the laity, and that they, therefore, were not liable to be prosecuted under it; and Lord Hardwicke, in delivering the unanimous judgment of the King's Bench, held this objection to the suit to be well founded, and a prohibition was granted on this point. (2 Atkyn's Reps. p. 650.)

There are passages to be found in Hooker's great work, "On the Laws of Ecclesiastical Polity," maintaining to the full extent the ruling of the judges, that the canon law has no force *proprio vigore* in this country. "It is a thing" (says Hooker, Bk. VIII. cap. VI. sect. 8) "most consonant with equity and reason that no ecclesiastical law be made in a Christian commonwealth without consent as well of the laity as of the clergy; but, least of all, without the consent of the highest power. For of this no man doubteth, that in all societies, what severally each shall be bound unto, it must be with all their assents ratified. Against all equity it were that a man should suffer detriment at the hands of men for not observing that which he never did, either by himself or others, mediately or immediately, agree unto." He proceeds to cite as authorities for these propositions Popes Nicholas and Innocent III., and adds:—"Pope Nicholas (A.D. 865),

although otherwise not admitting lay persons, no, not emperors themselves, to be present at synods, doth, notwithstanding, seem to allow of their presence when matters of faith are determined whereunto all men must stand bound."

He then cites the 42nd Canon of the Fourth Lateran Council (A.D. 1215), said to have been drawn by Adrian III., as expressive of Adrian's opinion that:—"As the laity should not hinder the clergy's jurisdiction, so neither is it reason that the laity's rights should be abridged by the clergy."

What portions of the early English canon law, or of the Roman canon law, are now in force in England may be supposed, after so great a lapse of time, to have been for the most part determined. But questions still arise from time to time in Courts, which involve the consideration whether or not the rules of the English or Roman canon law, or either of them, are applicable to their solution. Thus, in *The Queen v. Millis*, the case to which I have already referred, the question debated was whether the rules enjoined by the laws of Edmund, and by one of Archbishop Lanfranc's Constitutions (A.D. 1076), that a marriage celebrated without the benediction of a mass priest was invalid, or the rule as laid down by a decree of Gregory IX., which declared that a marriage by consent merely was valid, had been adopted as part of the common law of England. The Lords were equally divided on the question; but on a technical ground the judgment was that the rule of the English canon law had been adopted.

It does not follow that rules of the English or Roman canon law, which are not comprised in the King's Ecclesiastical Laws, are for that reason to be

discarded as unworthy of weight or consideration in the Ecclesiastical or Civil Courts of this country, when they are germane to the question under consideration. They may serve a useful purpose in one of three ways. They may be relied upon, or even adopted in doubtful cases, as being in the nature of precedents, or they may be of use for the purpose of elucidation or illustration, in like manner as Lord Mansfield and our equity judges, when new cases have arisen, have sometimes fallen back on the rules of the civil law. A reference to the Ecclesiastical Reports will furnish numerous instances in which our ecclesiastical judges have referred to the English or Roman canon law for one or more of these purposes. Sir John Nicholl did so in *Kemp v. Wickes*, where the question of the validity of baptism by a Nonconformist minister or a layman was raised (3 Phillimore's Reps. 264); so did Lord Brougham, in the case of *Escott v. Mastin*, where the same question was again raised, in delivering the judgment of the Judicial Committee (4 Moore's Privy Council Reports, p. 104). So did Sir Herbert Jenner Fust, in his judgment in the *Stone-Altar Case* (*Faulkner v. Litchfield*, 1 Robertson's Ecclesiastical Reports, p. 184); and so did Lord Stowell, in very many of the judgments he delivered in the Consistory Court of London; and in his great judgment, in *Dalrymple v. Dalrymple*, he speaks of the canon law "as a system which, in spite of its absurd pretensions to a higher origin, is in many of its provisions deeply enough founded in the wisdom of man" (2 Haggard's Consistory Reports, p. 64).

Where the canon law, be it Roman or English, is at variance with the doctrines and principles of the Reformation, or with the common or statute law of

England, it should have no place on questions relating to the discipline or government of our Church. When it treads on neutral ground, it is entitled both to consideration and weight, as expressive of the deliberate opinions of men of light and learning in the only system of ecclesiastical law that for centuries dominated in western Europe.

RULES AND REGULATIONS, 1877,

(Made in pursuance of 10 Geo. IV. c. 53, s. 9,)

*To be observed in all Causes, Suits, or Proceedings instituted
in the Consistory Court of London.*

ORDER I.—COMMENCEMENT OF SUITS, CITATIONS, &c.

THE Vicar-General and Official Principal in and throughout the Diocese of London having considered it expedient that certain of the existing orders and regulations now observed in the proceedings of the Consistory Court of London should be amended, and that additional orders should be made for further expediting and regulating the said proceedings, does hereby order and direct that the following rules and regulations (in lieu of the existing rules and regulations) shall be observed from and after the 26th of June, 1877 :—

1. The form of proxy appointing a proctor in a suit shall be in the form annexed.

2. All decrees, citations, monitions to enforce decrees or orders of court, inhibitions, compulsories, and other instruments under seal, shall be issued from the registry of this Court, in forms to be approved of by the judge, on written application (from the proctor of the party or

parties requiring the same, and signed by him), and no act of Court shall be necessary to lead such decrees, citations, monitions, inhibitions, compulsories, or other instruments, and the same shall bear date on the day on which they are respectively issued.

3. Applications for leave to commence proceedings by monition for the purpose of obtaining an order of Court to restrain the commission of an act contrary to ecclesiastical law, or to compel the performance of any duty, or for the purpose of obtaining an order of Court in any matter in respect of any church, chapel, churchyard, or consecrated burial ground, or in respect of the furniture or ornaments in any church or chapel, shall be made *ex parte* to the judge in Court or in Chambers, and an affidavit shall be filed in support of such application, and the monition shall, upon an order being made by the judge for that purpose, issue from the registry in such form as the judge shall approve, and every such monition shall, in the first instance, be an order to show cause at such time as the judge shall name in such monition, and if no sufficient cause be shown, the judge shall make such order in the matter as shall be just.

4. All decrees, citations, monitions, inhibitions, compulsories, and other instruments heretofore returnable or brought into Court or in Chambers, shall be returnable or brought into the registry of the Consistory Court; and the said decrees, citations, monitions, inhibitions, compulsories, and all other instruments so returned or brought into the said registry, shall have the same full force and effect in law as the like instruments have heretofore had when returned into Court.

5. All such instruments shall be so returnable on the third day after service. The proctor shall file his proxy

in the registry on the day on which he returns his decree.

6. The return of all instruments into the registry shall be entered by the registrar on the day on which they are so returned in a book to be kept for that purpose.

7. An appearance shall be entered in the registry by the proctor for the party cited within six days after the return of the decree or citation, and if no such appearance be entered within that time it shall be competent to the party promoting the suit to proceed in default of such appearance, but an appearance may be entered at any time during the dependence of the suit with the consent of the judge in chambers.

8. On an appearance being entered a duplicate copy thereof shall be given to the proctor returning the decree, who shall file his articles, libel, or petition, in the registry, within six days from his having such notice, and deliver a copy thereof to the proctor for the party cited.

9. Where a party has entered an appearance, the judge may at any time before judgment order the decree, citation, or monition to be amended, subject to such terms as to costs or otherwise as he shall deem just.

ORDER II.—PLEADINGS.

1. Every pleading shall contain as concisely as may be the statement of the material facts upon which the party pleading relies, but not the evidence by which they are to be proved, such pleadings being divided into separate articles or paragraphs, and shall be headed in the form annexed.

2. Every pleading shall be deemed to be admitted, unless the opposite party gives notice within eight days

of the delivery of the same that he objects to its admission, and an order is made for its rejection or amendment.

3. A party objecting to the admission of any pleading shall within eight days after the delivery to him of the copy of such pleading, file in the registry, and deliver to the opposite party, a notice specifying his objection to the pleading, and the opposite party shall without any leave be at liberty to amend his pleading for the purpose of meeting such objection; and in default of his making within eight days of the delivery of such notice such amendment as shall satisfy the objector, the judge shall appoint a day to hear and determine in chambers the objection to such pleading.

4. Pleadings in answer, and subsequent pleadings, shall be filed and delivered within eight days from the delivery of the last preceding pleading.

5. A party appearing to a monition issued under Order I. Rule 3 shall not be entitled to plead to the same without leave granted by the judge in chambers, and on cause being shown both parties shall be at liberty to file affidavits and examine witnesses in support of their respective cases.

ORDER III.—AMENDMENT OF PLEADINGS.

1. The judge may at any stage of the cause allow either party to alter his pleadings, and shall order all such amendments as may be necessary for the purpose of determining the real question in controversy.

2. The plaintiff may without any leave amend his articles, libel, or petition, at any time before the expiration of the time limited for pleading in reply, or where

the defendant has filed no pleading in defence, at any time before the cause is set down for hearing, subject to filing in the registry and to service on the defendant of a copy of such amended pleading.

3. The defendant may amend his pleading in defence without any leave at any time before the expiration of the time allowed him for pleading to the reply.

ORDER IV.—APPLICATIONS FOR FACULTIES.

1. In proceedings for Faculties the petition filed by the applicant shall be treated as the first pleading in the cause.

2. An answer to the petition for a Faculty shall state one or more grounds of objection to the granting of the Faculty, but the party opposing the Faculty shall not be precluded at the hearing of the cause (but subject to such terms as to adjournment and otherwise as the judge shall order) from taking further grounds of objection.

3. Where an appearance has been entered, but no answer filed within eight days of the entry of such appearance, nor leave obtained for further time to plead, the judge shall fix a day for hearing in Court the application for the Faculty, of which each party shall have notice, and the party who has entered the appearance may be heard either by counsel or in person, and produce evidence in opposition to the Faculty, but subject to such terms as to adjournment and otherwise as the judge shall order.

4. In opposed Faculty cases, or in cases in which the judge has directed the Faculty to be moved for in Court, the Faculty shall be moved for in Court by counsel, or by a petitioner in person.

ORDER V.—SPECIAL CASES.

1. The parties may after the return of the decree, citation, or monition, and the entry of an appearance by the party cited, concur in stating the questions of law arising in the suit in the form of a special case for the opinion of the judge. Every such special case shall be divided into paragraphs numbered consecutively, and shall concisely state such facts and documents as may be necessary to enable the judge to decide the questions raised thereby. Upon the argument of such case, the judge and the parties shall be at liberty to refer to the whole contents of such documents, and the judge shall be at liberty to draw from the facts and documents stated in any such special case any inference, whether of fact or law, which might have been drawn therefrom if proved at a trial.

ORDER VI.—SETTING DOWN THE CAUSE.

1. Upon the conclusion of the pleadings, the plaintiff shall set down the cause for hearing in the registry, and on the same day give notice thereof to the defendant, and in default of the plaintiff setting down the cause within ten days of the conclusion of the pleadings, the defendant shall be at liberty to set it down, giving like notice to the plaintiff.

ORDER VII.—AS TO MARRIAGE LICENCES.

1. No party shall be heard in objection to the granting of a marriage licence until he has entered an appearance in the registry.

2. Objections to the granting of a marriage licence shall be heard summarily without pleadings, and at such time as the judge shall appoint.

ORDER VIII.—REVISION OF FEES FOR MARRIAGES,
BURIALS, &c.

1. Application for the revision or approval of a scale of fees for marriages, burials, &c., shall be made to the judge by petition, to be signed by the applicant or applicants, and to be filed in the registry. Forms of the petition will be supplied on application at the registry.

2. Any parishioner shall, on entering an appearance in the registry, be entitled to be heard in opposition to the said application.

3. The applicant shall, before the judge makes any order on his petition, give such notices and produce such evidence as the judge shall direct.

4. The petition shall be heard in Court if the judge shall so direct.

ORDER IX.—AS TO WITNESSES.

1. In the absence of any agreement between the parties, the witnesses at the hearing of any cause shall be examined *vivâ voce* and in open Court; but the judge may for sufficient reason order any particular fact or facts to be proved by affidavit, or allow the affidavit of any witness to be read at the hearing on such conditions as the judge may think reasonable; or may order any witness, whose attendance in Court ought for some sufficient causes to be dispensed with, to be examined before an examiner of the Court, or a commissioner acting under a commission from the Court.

2. In all cases where witnesses are examined by an examiner of the Court, they may be produced and sworn before a surrogate in default of the appearance of the other proctor or party, if he refuse or neglect to attend after having received written notice thereof.

3. All examinations and cross-examinations before an examiner or a commissioner may be conducted either by counsel or proctors, or by the examiner or commissioner upon interrogatories as the proctors may determine, and where counsel are employed the fees of one counsel may be allowed on taxation.

4. In any compulsory requiring the attendance of witnesses, it shall be competent to insert a clause, (where applied for,) requiring any witness or witnesses to produce any paper, book, or document that may be considered material to the interest of the cause.

5. In all cases where documents or papers in possession of either party are required to be produced at the hearing of the cause, a notice shall be left in the registry and served on the other party, signed by the proctor of the party, requiring their production three days at least before the hearing of the cause.

ORDER X.—TAXATION OF COSTS.

1. When either of the parties is condemned in costs, the proctor shall lodge his bill of costs in the registry, and deliver a copy thereof to the other proctor within twenty-one days from the day of the decree.

2. The registrar shall give notice to both proctors of the time appointed for taxing the said bill, and may proceed to do so (after such notice) in the absence of the proctor of the party condemned in costs, and on the

completion of such taxation shall enter in the notice book his report of the amount to be allowed in respect of such costs.

3. If either of the proctors object to such taxation, notice thereof shall be left in the registry within ten days from the day of such taxation, and the same shall thereupon be referred to the judge, who may hear and determine on such objection in chambers, but if no such notice be left, the registrar's taxation shall be conclusive.

4. If the proctor whose bill of costs has been taxed requires a monition to enforce the payment thereof, he shall lodge a written application in the registry, and leave a copy thereof with the other proctor within fourteen days from the time of the registrar's taxation or judge's decision thereon, as the case may be.

ORDER XI.

1. If a proctor wishes to apply to have a party pronounced in contempt for not having obeyed any decree, citation, monition, inhibition, compulsory or other order of the Court, he shall leave a notice in the registry containing full particulars of such intended application, and whether any and what notice thereof has been given to such party, and the date thereof.

2. In case of a party appearing in person in any suit, either as promoter or defendant, the foregoing orders shall be applicable to and observed by such party as far as circumstances will permit.

3. All notices, declarations, &c., required by the foregoing rules to be given by proctors, shall be so given in forms to be approved of by the judge, and shall bear date on the day on which they are left in the registry,

and shall be signed by the proctor or his substitute, and copies or duplicates of such notices, &c., shall be given on the day they are so dated and left in the registry, to the other proctor in the cause.

4. It shall be competent to the judge, on application in chambers, supported by affidavits, if necessary, to shorten or extend the times fixed by these orders or practice.

5. The registrar will enter in a book to be kept for that purpose the dates when the several papers, notices, &c., are filed, and the other proceedings taken, and report to the judge in case of any delay or noncompliance with these orders, who shall thereupon make such orders for expediting the proceedings as he may see fit.

6. The notices and forms annexed to these orders shall be followed as near as the circumstances of each case will permit.

7. Where no other provision is made by the foregoing orders, the present procedure and practice remain in force.

8. The foregoing orders shall extend to all causes pending, so far as the same are applicable.

ORDER XII(a). (Made Nov. 30th, 1878.)

1. The judge may, at any stage of a Faculty case, order a further citation to issue, and may for such purpose adjourn the hearing or further hearing of the case,

(a) ORDER XII.—CANTERBURY RULES. (Nov. 18, 1878.)

1. Citations in Faculty cases may be forwarded from the registry for service in registered letters.

2. The citation after service is to be returned to the registry with a certificate of service indorsed thereon signed by the parish clerk, sexton, or any ratepayer resident in the parish, and, except when otherwise ordered by the judge, such certificate of service is to be deemed evidence of service.

and may order the Faculty to issue in such terms as to the judge shall seem just.

2. Applications to hear matters referred to the Court by the Lord Bishop of London, for its opinion thereon, shall be made to the judge by petition to be signed by the applicant or applicants, and to be filed in the registry.

3. Copies of the petition shall be delivered by the petitioner to all parties interested in the question raised by the petition. The parties interested may file answers to such petition, and the petitioner may file a reply to such answers within such time as the judge shall order.

ORDER XIII. (Made Jan. 27th, 1892.)

1. In Faculty cases the judge may at the hearing grant leave to parties, who have not entered an appearance, on being satisfied of their interest, to enter an appearance, and to be heard in opposition to the Faculty, or on questions arising on the Faculty asked for, subject to such terms as the judge may then or after the hearing order.

2. Before a Faculty issues for the removal, on sanitary grounds, of remains from a church or churchyard to a churchyard or other consecrated burial ground, a notice of the proposed application or removal, in the form to be approved of in the registry, shall be advertised three times in some newspaper circulating in the neighbourhood, to be named by the judge or by the registrar, and a copy of such notice shall be delivered or sent by post to any person known or believed to be the personal representative, or a near relative of any person whose remains it is proposed to remove under the Faculty.

ORDER XIV. (Made Jan. 27th, 1892.)

1. Differences between incumbents relating to their claim to fees under the Burial Acts or otherwise, when the Court has jurisdiction to determine the matter in difference, shall be raised after the return of the citation by petition and answer.

2. Upon the petition and answer having been filed, the judge shall appoint a day for the parties to produce before the Court the evidence upon which they rely, in support of their respective cases, and the judge, if desired by the parties, or any of them, shall hear counsel on any question of law arising thereon, on the same or on some subsequent court-day to be fixed by the judge.

ORDER XV. (Made Jan. 17th, 1893.)

1. Every Faculty granted on sanitary grounds for the removal of remains interred underneath a church or in a churchyard, to other consecrated ground, shall contain a proviso ordering that the removal of such remains and the works connected therewith shall be carried on under the orders and directions of the sanitary officer of the district within which the church or churchyard, from which the remains to be removed, is situate, and further ordering, that such sanitary officer shall have authority, pending a reference to the judge, to stop any works connected with the removal of such remains on sanitary grounds, or on grounds of decency, or on the ground that they are in contravention of or are unauthorized by the Faculty.

2. Contemporaneous with the issue of the Faculty, a written notice thereof shall be sent from the registry to the sanitary officer of the district, with a copy of the operative part of the Faculty and of the proviso.

ORDER XVI. (Made Jan. 17th, 1893.)

That every petition for a Faculty for an alteration in, or for the restoration of a church shall, in addition to containing a statement of what is supposed to be the date or dates of the architecture of the church, contain a paragraph to the following effect, "That no carved work in wood or stone, no stained glass window or ornamental work in metal or other material, and no ancient window, doorway, or other specimen of ancient architecture, will be destroyed or interfered with by the proposed plan for the alteration or restoration of the church."

THOMAS H. TRISTRAM.

FORMS of NOTICES and INSTRUMENTS *to be adopted as nearly as the circumstances of each case will allow.*

No. 1.—FORM OF PROXY.

I, A. B., of _____, in the county of _____, hereby nominate and appoint C. D., of Doctors' Commons, London, proctor, to be proctor for me in a cause I am about to institute in the Consistory Court of London against E. F., or in a cause now depending in the Consistory Court of London, entitled [*as the case may be*].

In witness whereof I have hereunto set my hand and seal this _____ day of _____.

No. 2.—FORM OF APPEARANCE.

In the Consistory Court of London.

The office of the judge promoted by A. v. B.
or A. v. B.

I, C. D., proctor, do hereby appear on behalf of B. or
D., the party cited, and pray articles—or libel.

Dated .

C. D.

FORM OF NOTICE OF OPPOSING ADMISSION OF ARTICLES
OR PLEAS.

In the Consistory Court of London.

The office of the judge promoted by A. v. B.
or A. v. B.

I, C. D., proctor for the promoter [defendant], do
hereby declare that I oppose the admission of the
articles, libel, or [plea], on the following grounds.

Dated .

C. D.

NOTICE AS TO PROVING THE CASE ORALLY.

In the Consistory Court of London.

The office of the judge promoted by A. v. B.
or A. v. B.

I, C. D., proctor for , do hereby give notice
that it is my intention to produce witnesses for examina-
tion *vivâ voce* in open Court [*or* before an examiner] [*or*
before a commissioner], and I pray a commission for
taking such examination, to be addressed to , to be
opened on , at , to be closed on or before ,
and to be returned by .

C. D.

FORM OF APPLICATION FOR COMPULSORIES.

In the Consistory Court of London.

The office of the judge promoted by A. v. B.

A. v. B.

I, C. D., proctor for the promoter [*or* respondent] pray compulsories requiring to appear before the judge of the above Court [*or* an examiner], [*or* commissioner duly appointed] at , on , to undergo examination, and then and there to produce [here enumerate the papers, &c., if any].

Dated .

C. D.

COMPULSORY.

JOHN, by Divine permission Lord Bishop of London, to all clerks and literate persons whomsoever and wheresoever in and throughout the whole Diocese of London, greeting. Whereas, in a certain cause now pending in our Consistory Court, before the worshipful Thomas Hutchinson Tristram, Doctor of Laws, our Vicar-General and Official Principal, promoted by against , application has been made for compulsories, citing certain witnesses to attend and undergo their examination, and also for the production of certain papers: we do therefore hereby authorize, empower, and strictly enjoin and command you jointly and severally peremptorily to cite, or cause to be cited, A., B., C., and D. to appear personally before us, our surrogate, or other competent judge in this behalf, in our Consistory Court in our Cathedral Church of St. Paul's, in the City of London, and place

of judicature, there on the day of next ensuing, at the hour of the sitting of the Court, and there to abide, if occasion require, during its continuance, and also on such subsequent Court day or days as may be appointed for the examination of witnesses in the said cause, then and there to take the oath by witnesses usually taken, and to testify to the truth of what they know in the said cause; [and we do further enjoin and command you to monish and require the said D. then and there to produce]; and further to do and receive as unto law and justice shall appertain, under pain of the law and contempt thereof. And what you shall do or cause to be done in the premises, you shall duly certify into our registry, situate No. 5, Dean's Court, Doctors' Commons, in the City of London, together with these presents. Dated at London, the day of , in the year of our Lord one thousand eight hundred and .

FORM OF PLEADING.

In the Consistory Court of London.

A. B., promoter or plaintiff.

C. D., defendant.

Libel of plaintiff filed by E. F., his proctor.

1. A. B. is a parishioner of the parish of in the diocese of London, &c.

The plaintiff prays the Court to decree (1) That [*state relief prayed*].

FORM OF PETITION FOR AN ORDER OR DECREE OF THE
COURT ON A CLAIM FOR BURIAL FEES.

The Petition of the Rev. A. B., Vicar of S., in the diocese of London, on behalf of himself and the vicars of other district parishes carved out of the original parish of C., by C. D., his solicitor.

Sheweth :

1. That there are now in the civil and original parish of C. six ecclesiastical parishes, namely, the Ecclesiastical Parish of C., in which is the mother church of the original parish of C., and five district parishes and churches, namely, the said parish of S., of which your petitioner is the vicar, the parish of T., of which E. F. is vicar, &c.

2. That your petitioner and all the other vicars of the said five district parishes claimed to be entitled to all ministers' fees payable for the interments, or for the purchase of ground vaults, brick graves, and private graves erected or used in the parochial burial-ground of the civil parish of C., for the burial therein of the remains of any person dying within the limits of the district annexed to their respective churches.

3. That C. D., as vicar of the mother church of C., claims the aforesaid fees by reason of his being vicar of the mother church.

Your petitioner humbly prays on behalf of himself and the other district vicars that the worshipful the judge will be pleased to inquire into the respective claims of your petitioner and the said other district vicars, and make an order declaring that the said district vicars are entitled to the said fees claimed by them, and to

make such further order in the premises as to the judge may seem right and just.

And your Petitioner will ever pray, &c.

Signed by solicitor.

FORM OF ANSWER OF C. D., VICAR OF MOTHER CHURCH.

The Respondent, the Rev. C. D., Vicar of C., in answer to the petition of the said A. B., filed on behalf of himself and the other district vicars in the civil parish of C., by his solicitor, says:

That he denies that the said district vicars in the civil parish of C., or any of them, are in law entitled to the fees payable for the purchase of ground vaults, brick graves, or private graves erected or used in the parochial burial ground of the parish of C., or for burying in the same the remains of persons dying within the limits of the districts annexed to their respective churches, and he asserts that he claims the aforesaid fees as due to himself as vicar of the mother church of the parish of C.

Wherefore the said respondent prays the worshipful the judge to inquire into the said matters in dispute, and to make an order that the respondent is entitled to the aforesaid fees.

And the Respondent will ever pray, &c.

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